In The

Supreme Court of the United States

MARK A. GLASS and
MARK A. GLASS ENTERPRISES, INC., *et al.*,

Petitioners,

v.

CAGLE FOODS JV, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Packers and Stockyards Act's prohibition of "any unfair, unjustly discriminatory, or deceptive practice" extends to all such practices (as the Ninth and Tenth Circuits hold) or only to practices that also have or are likely to have an adverse effect on competition (as the Seventh and Eleventh Circuits hold).

II. Whether by requiring proof of intentional discrimination to sustain an action under the Packers and Stockyards Act, the Eleventh Circuit misconstrued the plain language of the statute and prior decisions of this Court.

III. Whether the Eleventh Circuit so far departed from the standards of Rule 56 of the Federal Rules of Civil Procedure in affirming summary judgment under the facts of these cases that this Court should exercise its supervisory authority to reverse the circuit court decisions.

LIST OF PARTIES

Petitioners include:

Mark A. Glass
Mark A. Glass Enterprises, Inc.
Travis Mims
Lucius Adkins
Jill Adkins
Richard E. Wheeler, III

Respondent is:

Cagle Foods JV, LLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 39.6, Mark A. Glass and Mark A. Glass Enterprises, Inc. state that Mark A. Glass Enterprises, Inc. is a privately held Georgia corporation. There are no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Mark A. Glass, Mark A. Glass Enterprises, Inc., Lucius Adkins, Jill Adkins, Travis Mims, and Richard E. Wheeler, III, jointly seek a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit in these cases.

OPINIONS BELOW

The unreported opinion of the Eleventh Circuit in *Glass v. Cagle's, Inc., et al.*, is reprinted in the appendix at App. 1-5. The opinion (App. 11-25) in *Adkins v. Cagle's, Inc., et al.*, is reported at 411 F.3d 1320 (11th Cir. 2005). The unreported opinion (App. 26-39) in *Mims v. Cagle Foods* is available at WL 1400259 (M.D. Ga. 2005). The unreported opinion (App. 6-10) in *Wheeler v. Cagle Foods* is available at WL 1349857 (M.D. Ga. 2005).

JURISDICTION

The judgment of the court of appeals in *Glass* was entered on April 5, 2005, and the court denied Glass' rehearing *en banc* on June 1, 2005. (App. 123) The judgment of the court of appeals in *Adkins* was entered on June 13, 2005. The judgment of the court of appeals in *Mims* was entered on June 15, 2005. The judgment of the court of appeals in *Wheeler* was entered on June 8, 2005.

Justice Kennedy extended the time to file the petitions in each case: *Glass* (Application No. 05A180) until September 29, 2005; *Wheeler* (Application No. 05A197) until October 6, 2005; *Adkins* (Application No. 05A219)

until October 11, 2005; and *Mims* (Application No. 05A220) until October 13, 2005.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 202 of the Packers and Stockyards Act (PSA) provides:

> It shall be unlawful for any packer or swine contractor with respect to livestock, meats, meat food products, or livestock products in unmanufactured form, or for any live poultry dealer with respect to live poultry, to:
>
> (a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or
>
> (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect; or
>
> (c) Sell or otherwise transfer to or for any other packer, swine contractor, or any live poultry dealer, or buy or otherwise receive from or for any other packer, swine contractor, or any live poultry dealer, any article for the purpose or with the effect of apportioning the supply between any such persons, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly; or
>
> (d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or

with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business, or (2) to apportion purchases or sales of any article, or (3) to manipulate or control prices; or

(g) Conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivisions (a), (b), (c), (d), or (e) of this section.

7 U.S.C. §192.

Section 2303 of the Agricultural Fair Practices Act provides:

It shall be unlawful for any handler knowingly to engage or permit any employee or agent to engage in the following practices:

(a) To coerce any producer in the exercise of his right to join and belong to or refrain from joining or belonging to an association of producers, or to refuse to deal with any producer because of the exercise of his right to join and belong to such an association; or

(b) To discriminate against any producer with respect to price, quantity, quality, or other terms

of purchase, acquisition, or other handling of agricultural products because of his membership in or contract with an association of producers; or

(c) To coerce or intimidate any producer to enter into, maintain, breach, cancel, or terminate a membership agreement or marketing contract with an association of producers or a contract with a handler; or

(d) To pay or loan money, give any thing of value, or offer any other inducement or reward to a producer for refusing to or ceasing to belong to an association of producers; or

(e) To make false reports about finances, management, or activities of an association of producers or handlers; or

(f) To conspire, combine, agree, or arrange with any other person to do, or aid or abet the doing of any act made unlawful by this Act.

7 U.S.C. §2301 et seq.

STATEMENT

Petitioners, Mark Glass, Lucius Adkins, Jill Adkins, Travis Mims, and Richard Wheeler, are family farmers who grew chickens under contract for Respondent, Cagle Foods JV, LLC, a joint venture between Cagle's, Inc. and Executive Holdings, LLC. Filing almost identical complaints and raising identical legal theories, Petitioners sued Respondent Cagle Foods, Cagle's, Inc. and its subsidiary, Cagle's Farms, Inc., under the PSA and AFPA and brought other claims under state laws. Petitioners have settled their claims against Cagle's, Inc. and Cagle's

Farms, Inc. In support of their PSA claims against Cagle Foods, Petitioners produced evidence that Cagle Foods unfairly provided sick and inferior birds, unfairly and discriminatorily withheld feed, unfairly misweighed their finished poultry, manipulated weekly flock settlements to favor other growers to the detriment of petitioners, and terminated Petitioner Mims' contract unfairly. Former employees of Cagle Food testified to much of Petitioners' complaints, and the evidence was uncontroverted that Respondent Cagle Foods consistently failed to timely provide feed and mismanaged its vaccination program resulting in unhealthy chicks being placed on Petitioners' farms. The evidence was in substantial conflict as to the Petitioners' other claims, but the Eleventh Circuit determined that none of Petitioners' claims warranted jury consideration.

All of these cases were decided by the Eleventh Circuit in close proximity to the decision in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005). In *London*, a jury found that the termination of the Londons' chicken growing contract violated the PSA, but the district court granted Fieldale's motion for judgment as a matter of law on the ground that the PSA bars unfair or deceptive practices only where they are shown to cause, or are likely to cause, an anticompetitive injury. The Eleventh Circuit affirmed, and the Londons are seeking a writ of certiorari to review the judgment. In deciding Mims' PSA unfair termination claim, the Eleventh Circuit relied on the holding in *London*, that the PSA bars only those unfair practices which adversely affect competition. On August 16, 2005, the Eleventh Circuit decided the case of *Pickett v. Tyson Fresh Meats, Inc.*, Dkt. No. 04-12137 (11th Cir. 08/16/05). Although the opinions in *Adkins, Wheeler* and

Glass are substantially similar and contain no reference to the *London* decision, the Court in *Pickett* cited both *London* and *Adkins* for the holding that claimants under the PSA must show that an unfair practice does or is likely to cause an anticompetitive injury to prevail. *Pickett* at pg. 14.[1]

Petitioners adopt herein and specifically rely upon the petition filed by the Londons in *London v. Fieldale Farms Corp.*, and urge the Court to grant this petition for consideration with *London* or, in the alternative, to hold this petition for remand of Petitioners' claims upon the resolution of the issue in *London*.

A. Factual Background

Like the Londons, Petitioners raised broiler poultry for processing into chicken meat under the integrated system of contract poultry production. Over 90% of the 40 billion pounds of poultry produced in the United States last year were grown under these arrangements.[2] Under this system, Petitioners provided the housing and labor for raising the birds to marketable age. Cagle Foods provided the birds, feed, medicine, and technical advice for raising the birds. (App. 27) The Adkins, Mims, and Glass built

[1] The *Pickett* panel stated, "[the] *London* decision settles in this circuit that by "unfair" practice, PSA §202(a) means a practice that does or is likely to adversely affect competition. Id. at 1303; see also *Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1324 n.6."

[2] Office of the Chief Economist, USDA, World Agricultural Supply and Demand Estimates, July 12, 2005, WASDE-424-29, at http://usda.mannlib.cornell.edu/reports.waobr/wasde-bb/2005/wasde07.pdf; National Chicken Council, *Growing Chickens Under Contract*, at http://nationalchickencouncil.com/aboutIndustry/detail.cfm?id=14.

their poultry houses specifically to house Cagle Foods' birds. Wheeler bought an existing farm built in accordance with Cagle Foods' specifications. All of the Petitioners bought or built poultry houses useful only for the growing of Cagle Foods' chickens. No other poultry processing companies operated in the areas in which Petitioners' poultry farms were located. Thus, Petitioners were dependent on the placement of birds by Cagle Foods.

Petitioners were paid under standard "take-it-or-leave-it" adhesion contracts drafted by the company and common to the industry, and substantially similar to the growing contracts utilized by Fieldale in the *London* case. Pursuant to these contracts, the Petitioners were paid under a formula based on the weight of the chickens upon their arrival at Cagle Foods' processing plant and after being transported and weighed by Cagle Foods' employees; and the weight of the feed transported, weighed, and delivered by Cagle Foods' employees. After the "grow-out" was complete (approximately 50-55 days), and the birds processed, Cagle Foods compared each grower's "cost" with the "cost" of all other growers whose birds went to the processing plant during that week. Growers were paid based upon their "cost" relative to the group. (App. 27) Growers with a lower cost were paid more money than growers whose cost was higher. Feed conversion, the weight of the feed consumed by the flock during the grow-out compared to the weight of the chickens when weighed at the processing plant, was the single most important factor in the determination of cost under Cagle Foods' payment formula. The difference in the pay between the grower with the highest "cost" and the grower with the lowest "cost" was often thousands of dollars per flock.

Once Cagle Foods determined the amount due each grower under the payment formula, Cagle Foods mailed settlement documents and a check to each grower. The settlement included information showing the weight of the birds and the weight of the feed delivered to the farm, and the weight of any feed left over at the end of the grow-out. For the settlement to be accurate, the numbers indicated on the settlement for bird weight, feed delivered, and feed recovered must be accurate. (App. 27)

The grower's management of the flock could influence the flock's performance and feed conversion, however there were many factors beyond the grower's control that affect performance and ultimately how much the grower was paid. Not all chickens are alike. Chicks that are hatched during the hen's optimal laying period tend to be better quality. Chicks hatched from younger hens are smaller and do not grow as well. Chicks hatched from older hens tend to be more susceptible to disease due to the thinning of the egg shell as the hens age. Cagle Foods placed chicks hatched from a wide spread of age hens and controlled which grower received which chicks. (App. 125-128, 141, 150, 153, 154)

Cagle Foods controlled the sanitation at the hatchery to avoid contamination of the chicks. The company controlled whether the birds were vaccinated properly so that they did not contract diseases and whether the chicks were transported from the hatchery in a temperature regulated vehicle so that they did not become too hot or too cold. Cagle Foods was responsible for making sure that its feed formulation was nutritionally adequate and appropriate for the stage of development. (App. 125-128)

Critical to the flock's performance was that Cagle Foods never allow the birds to run out of feed during the

growth of the flock, as to do so destroys the opportunity of the grower who was allowed to run out to perform well in comparison to other growers in the settlement. (App. 136) The company was responsible for making sure that the feed picked up at the end of the flock was appropriately weighed and accounted for in the settlement. Finally, Cagle Foods was required to transport the flock promptly from the farm to the processing plant to avoid excessive shrinkage and to weigh the birds using the same equipment to determine tare (empty) weight that it used to determine gross (loaded) weight so that the net weight of the load of poultry was accurately stated.

In late 1997, Cagle Foods began to reduce the number of birds placed in its broiler growers' houses. Alarmed at the effect of reduced placements and longer lay-out times, the company's contract growers began to have meetings. In 1998, Cagle Foods' growers formed the United Poultry Growers Association.[3] Petitioner Lucius Adkins became the Association's President in late 1998. (App. 15) Petitioner Mark Glass was elected its Secretary/Treasurer. Petitioners Travis Mims and Richard Wheeler were also actively involved in the association. (App. 28) Petitioners attended meetings of growers and actively encouraged participation in the association. Adkins and Glass traveled extensively, testifying in legislative hearings before members of the Georgia Legislature. The efforts of Petitioners and other dedicated growers resulted in the passage of new legislation favorable to poultry growers in the State of Georgia, HB 648, codified as O.C.G.A. §2-21-1.

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[3] See, www.unitedpoultrygrowers.com

Petitioners testified that Cagle Foods' employees discouraged association participation and threatened to move to another state if its growers organized. In December of 1998, Cagle Inc.'s CEO, Doug Cagle, accompanied by Cagle Foods' top management employees, met with both Glass and Adkins. Cagle expressed his disapproval of the comments being made by Adkins, told Glass that they would "pass legislation over my dead body," and threatened Glass that if he did not "stop talking" . . . "ya'll are going to have problems."

After becoming involved in the Association, the Petitioners suffered declines in their performance relative to other growers. This drop in performance decreased their pay in comparison to other growers with whom they settled. Most dramatic was the decline in Mark Glass' and the Adkins' flock performance. Glass' performance rankings relative to other growers fell from 26 out of 86 growers in 1997, to 77 out of 87 by 2001. The Adkins' two farms declined from 7th and 8th place out of 64 growers in 1996, to 67th and 73rd out of 87 growers in 2001. Like the Londons, Petitioners attributed their decline in performance to retaliation for protected activity; the Londons for Harold London's damaging testimony, and these Petitioners for their association membership and related activities.

Petitioners provided evidence in response to Cagle Foods' summary judgment motion that supported their prior deposition testimony and interrogatory responses that they received poor quality chickens and frequently ran out of feed. Petitioners relied on the affidavits of the feed mill manager and a supervisory employee at the feed mill verifying that two company managers, Gene Mullins and Donnie Peters, were manipulating the broiler flock settlements, and would tell the feed mill employees to

send feed to favored growers while allowing other growers to run out. (App. 140, 144, 160) The same managers referred to Lucius Adkins as "the Godfather," kept tabs on who attended grower meetings, and discussed pressuring petitioners to sign an arbitration contract which the Petitioners had rejected. (App. 141) At the end of the grow-out, Mullins and Peters would go to the feed mill and demand that changes be made to feed records, forcing the feed mill manager to create false feed tickets. (App. 140, 145) The manager of the feed mill averred that, "it was obvious that Donnie and Gene were manipulating the grow-out settlements to help certain growers and hurt other growers." (App. 140)

Many of the changes were to benefit a grower by the name of Joe Gaines, a friend of Donnie Peters. Mr. Gaines provided an affidavit in which he stated that the majority of birds he received while Peters was employed by Cagle Foods were of good quality and he performed well. (App. 153) After Peters left the company, Gaines' performance plummeted.

Petitioners also provided affidavit evidence that Cagle Foods targeted a grower for poor quality chicks and deviated from the chick delivery schedule to send birds to farms out of order. (App. 150) Petitioners further provided expert evidence and admissions by a former hatchery manager that Cagle Foods failed to vaccinate its mother flocks properly for REO virus, causing leg problems and poor performance in the Petitioners' flocks (App. 128, 132); and that the company provided birds that had gumboro disease, a disease that attacks the bird's immune system and causes poor performance, and for which the company failed to vaccinate. (App. 129) Petitioners submitted expert evidence and admissions by company employees that

Cagle Foods' chickens had other health problems caused by company failures; health problems which also affected Petitioners' performance. (App. 127-129)

B. Procedural Background

Petitioner, Mark A. Glass, filed his Complaint against Cagle Foods on June 15, 2001, and amended the Complaint to add Mark A. Glass Enterprises, Inc. on June 22, 2001. Glass brought his case pursuant to the Packers & Stockyards Act, 7 U.S.C. §181, et seq., and the Agricultural Fair Practices Act, 7 U.S.C. §2301, et seq., along with a number of other claims. Cagle Foods moved for summary judgment. On September 29, 2004, the district court entered an order granting Cagle Foods' Motion for Summary Judgment. (App. 40-61) The court of appeals affirmed the judgment of the district court on April 5, 2005, and denied his motion for rehearing on June 1, 2005.

Petitioners, Lucius and Jill Adkins, filed their Complaint against Cagle Foods on June 22, 2001, alleging violations of the Packers & Stockyards Act, 7 U.S.C. §181 et seq., and the Agricultural Fair Practices Act, 7 U.S.C. §2301 et seq., along with a number of other claims. After consolidating discovery with the other three cases, Cagle Foods moved for summary judgment. On March 24, 2004, the district court granted Cagle Foods' Motion for Summary Judgment. (App. 81-100) The court of appeals affirmed the judgment of the district court on June 13, 2005.

Petitioner, Travis Mims, filed his Complaint against Cagle Foods JV, LLC on June 27, 2001, asserting claims for violations of the Packers & Stockyards Act, 7 U.S.C. §181 et seq., and the Agricultural Fair Practices Act, 7

U.S.C. §2301 et seq., in addition to other claims. Cagle Foods moved for summary judgment on all of Mims' claims. On March 26, 2004, the district court granted Cagle JV's Motion for Summary Judgment. (App. 101-122) The court of appeals affirmed the judgment of the district court on June 15, 2005.

In January 2001, Petitioner, Richard Wheeler's original complaint, a proposed class action filed in the Northern District, was transferred to the U.S. District Court for the Middle District of Georgia. Wheeler filed his Second Amended Complaint against Cagle Foods JV, LLC on January 15, 2001, asserting in part, his claims for violations of the Packers & Stockyards Act, 7 U.S.C. §181 et seq., and the Agricultural Fair Practices Act, 7 U.S.C. §2301 et seq. Cagle Foods moved for summary judgment. On September 28, 2004, the district court granted Cagle Foods' Motion for Summary Judgment. (App. 62-80) The court of appeals affirmed the judgment of the district court on June 8, 2005.

REASONS FOR GRANTING THE PETITION

I. Petitioners' Cases Will Be Decided By The Petition and Argument in *London v. Fieldale*, 410 F.3d 1295 (11th Cir. 2005) For Application Of the Correct Interpretation of "Unfair" and "Unjustly Discriminatory" In the PSA.

Petitioners request that the Court grant this petition for consideration with the case of *London v. Fieldale*, 410 F.3d 1295 (11th Cir. 2005) on petition for certiorari. In the alternative, Petitioners request that the Court hold the petition until resolution of the *London* case and remand

for consideration by the Eleventh Circuit under the correct interpretation of the Packers and Stockyards Act. Petitioners adopt and rely upon the petition in *London*, and they show that its resolution should result in an order of remand for review of each of their cases by the Eleventh Circuit Court of Appeals using the proper interpretation of "unfair" and "unjustly discriminatory." Petitioners have provided a courtesy copy of the *London* petition to Cagle Foods' counsel.

II. The Eleventh Circuit's Interpretation of the PSA Strips Poultry Growers of All Protection and Leaves Them With No Remedy For Unfair Practices.

A. The Eleventh Circuit Misconstrued the Plain Language of the Statute And Ignored This Court's Precedent.

The PSA specifically prohibits all "unfair" practices, as well as all "unjustly discriminatory" practices. Section 192(a) of the Act prohibits poultry dealers from "[e]ngaging in or us[ing] any unfair, unjustly discriminatory, *or* deceptive practice." (emphasis added)

Cagle Foods acknowledged that Petitioners presented evidence that they were provided poor quality and sick birds on occasion and that they experienced problems with delayed feed deliveries. The court of appeals, in affirming summary judgment, either failed to address this undisputed evidence, or determined that the evidence fell short of stating a claim under the PSA because the Petitioners had no direct proof that Cagle Foods intended to target them for poor quality birds or intentionally allowed them to run out of feed. (App. 2, 7, 17, 18, 31, 32)

However, undisputed testimony established conclusively that running out of feed causes poor performance and decreases a grower's pay. (App. 136) No one disputed that the Petitioners ran out of feed almost *every flock*. At the very least, Petitioners should have been given the opportunity to prove to a jury that they were damaged as a result of this unfair practice. The Eleventh Circuit compounded the problem by also affirming the district court's holding that failing to provide feed did not breach the contracts, even though the contracts on their face obligated the company to provide feed. Just as it did in *London*, the Eleventh Circuit further found that the company did not breach the contract by providing sick birds. Taking the Eleventh Circuit's reasoning to its logical conclusion, the Petitioners and the Londons would have no recourse even if the company provided no feed to the flock or if every chick delivered died.

By requiring proof of discriminatory intent, the Eleventh Circuit misapplied the plain language of the PSA's prohibition against *any unfair practice*. It is an unfair practice to force a grower who runs out of feed during the grow-out to compete for pay with growers who receive feed and do not run out. (App. 136) It is equally unfair to pay a grower less money than other growers because he was provided unhealthy chicks which failed to perform despite his best efforts. This Court noted in *Stafford v. Wallace*, 258 U.S. 495, 514 (1922), that in enacting the PSA, Congress sought to forbid packers from engaging in "unfair, discriminatory, or deceptive practices." The Act says nothing that could be construed to require intentional as opposed to negligent conduct. This Court has previously held that the PSA may be violated even where the prohibited conduct is unintentional. *Butz*

v. Glover Livestock Commission Co., 411 U.S. 182, 187 fn.6, 93 S. Ct. 1455 (1973).

In denying Petitioners their right to a jury determination of their PSA claims, the Eleventh Circuit improperly imposed upon the Petitioners a burden to show that Cagle Foods' failure to deliver quality chicks and timely feed was intentional, rather than negligent. The Eleventh Circuit thus misconstrued the plain language of the Act, and decided an important federal question in a way that conflicts with relevant decisions of this Court.

B. The Decisions of the Eleventh Circuit in These Cases Have Broad Ranging Consequences for Poultry Contractors.

This result is particularly untenable given the huge discrepancy in profits between processors and growers.[4] Most growers live paycheck to paycheck, and many, like Travis Mims, are just one settlement check ahead of bankruptcy. Contract growers put up a few hundred thousand dollars of equity and borrow several hundred thousand dollars more to hire themselves at minimum wage with no benefits and no real rate of return on their equity, while integrators continue to earn ten to twenty-five percent rates of return on equity.[5] Unfairness is

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[4] Michael Donohue, *The Importance and Value of America's Poultry Farms*, at http://www.nationalchickencouncil.com/aboutIndustry/detail.cfm?id=20; Marc Linder, *I Gave My Employer a Chicken That Had No Bone: Joint Firm-state Responsibility for Line-Speed-Related Occupational Injuries*, 46 Case Western L. Rev. 33, 46 (1995) (citing Mary Clouse, *Farmer Net Income from Broiler Contracts (Rural Advancement Foundation International-USA)*, Jan. 1995, at 5).

[5] C. Robert Taylor, *Restoring Economic Health to Contract Poultry Production*, p. 6, at http://www.auburn.edu/~taylocr/topics/poultry/poultryproduction.html.

pervasive in contract poultry growing.[6] Because the USDA has no enforcement power over poultry, *Jackson v. Swift-Eckrich*, 836 F. Supp. 1447 (W.D. Ark. 1993), a grower's only remedy is to pursue their private right of action.

The Eleventh Circuit's affirmances of these cases with little analysis of the record will deter other poultry growers from filing claims against their processor. The Eleventh Circuit has undermined Congress' efforts in enacting the PSA and the AFPA to remedy industry abuses in the meat packing industry.

The legislative history of the Agricultural Fair Practices Act sheds light on Congress' concern with the unfair trade practices affecting producers.

> Producers have suffered harassment and reprisal by some processors because of activity in organizing and joining a cooperative. Grower

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[6] Winston-Salem Journal, *Killing Floor Tales: Poultry Growers at Mercy of Industrialized Agriculture and Short, Tenous Contracts Drawn up by Food Giants*, at http://www.poultry.org/labor_winston.html; Alex Todorovic, *Fowl Play*, at http://www.scpronet.com/point/9605/p06.html; Karen Chapman, *Down on the Farm: Modern Day Sharecroppers*, at http://www.tompaine.com/feature.cfm/ID/5036; Barry Shlachter, *Contract growers hoping the chicken industry offers a steady nest egg may instead be trapped by debt*, at http://www.newfarm.org/news/2005/0405/040505/contracts.print.shtml; Carol Countryman, *Chicken Fat Goes to Processors While Growers Go Bankrupt*, at http://www.populist.com/2.96.Chicken.html; The Baltimore Sun, Feb. 28, 1999, *The Plucking of the American Chicken Farmer* at http://www.agribusinessaccountability.org/page/220; The Baltimore Sun, March 1, 1999, *Taking a Stand, Losing the Farm*; The Baltimore Sun, March 2, 1999, *Unprotected and Alone*; Megan Wilde, *The Foul Industry: Methods and Problems in the Production and Processing of Poultry*, at http://www.wildewildeweb.com/personal/schoolessays/poultry.html; Jim Cullin, *Poultry Growers Seek Rights in Mississippi*, at http://www.populist.com/4.96.Poultry.html.

> contracts have been canceled or reduced in volume. Processors have offered inducements to growers not to join a cooperative. Attempts have been made to buy off the cooperative's leaders to create dissension in the organization.
>
> Processors operating in several production areas have coerced growers desiring to form a bargaining cooperative by threatening to leave the cooperative's territory and expand operations elsewhere. Growers have failed to get redress after such questionable processor actions.
>
> 1968 USCCAN 1867, 1967 WC 4172.

Contract growers are unwilling to testify against processors as they risk losing their livelihood.[7] This case is a perfect example of the efforts processors will go to to deter growers from seeking redress. Cagle Foods sought to recover from these Petitioners over $700,000.00 in attorneys' fees just for the fees paid to its attorneys to defend Petitioners' AFPA claims on appeal. The Eleventh Circuit opinions further discourage all growers from pursuing meritorious claims.

III. The Eleventh Circuit Ignored the Standard for Review of Summary Judgment.

In affirming summary judgment for Cagle Foods on Petitioners' claims, the Eleventh Circuit made the same error as did the district court. The court drew all inferences from the disputed facts in favor of Cagle Foods. This

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[7] Henry A. Wallace Center for Agricultural & Environmental Policy, *The Effect of Laws that Foster Agricultural Bargaining: The Case of Apple Growers in Michigan and New York State*, p. 3.

Court has repeatedly held that a Rule 56 summary dismissal is appropriate only in very limited circumstances. "This rule authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, or it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S. Ct. 486 (1962), citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)

In affirming the district court's orders, the Eleventh Circuit found insufficient evidence of a conspiracy by Cagle Foods' employees to retaliate against Petitioners. However, this Court has noted that where the sequence of events creates a substantial enough possibility of a conspiracy, especially where the non-circumstantial evidence of a conspiracy could only come from adverse witnesses, it is error to grant summary judgment. *Adickes v. S.H. Cress & Co.*, 90 S. Ct. 1598, 398 U.S. 144, 157 (1970)

The Eleventh Circuit failed to draw even one reasonable inference from Petitioners' circumstantial evidence. Petitioners' evidence included affidavits that grower settlements were manipulated to favor some growers and hurt others; that some growers consistently received good quality birds, while others were targeted for poor quality birds; that Cagle Foods allowed some growers to run out of feed, while others received more than they needed; that Cagle Foods' managers referred to Lucius Adkins, the association president, as "the Godfather"; and urged employees to pressure Petitioners to sign contracts containing arbitration. Petitioners presented evidence that their performance rankings declined and they were paid

less for those flocks which performed poorly. It was hardly reasonable for the court to require that Petitioners obtain admissions from the very employees who were retaliating in order to avoid summary judgment.

CONCLUSION

After taking considerable risk in seeking redress against a processor with hefty resources and political clout, Petitioners have been denied their right to a trial before a jury. Petitioners respectfully urge this Court to grant this petition or, in the alternative, to withhold ruling on this petition pending this Court's consideration of the petition for writ of certiorari in *London v. Fieldale*, and to remand Petitioners' cases.

Respectfully submitted,

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September 2005

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-15431
Non-Argument Calendar

D.C. Docket No. 01-00118-CV-WLS-1

MARK GLASS and
MARK A. GLASS ENTERPRISES, INC.,

Plaintiffs-Counter-Defendants-Appellants

versus

CAGLE'S INC.,
CAGLE'S FARMS, INC.,
CAGLE FOODS JV, LLC

Defendants-Appellees,

d/b/a CAGLE-KEYSTONE FOODS,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(April 5, 2005)

Before HULL, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Mark Glass appeals the summary judgment entered for Cagle's Inc., Cagle's Farms, and Cagle Foods JV, LLC. He argues that genuine issues of material fact remain regarding each of his claims against each defendant. We disagree and affirm as to Cagle Foods. We dismiss the appeal as to Cagle's Inc. and Cagle's Farms because Glass failed to address an issue fatal to his claims.

Although the district court held that Glass's claims against Cagle's Inc. and Cagle's Farm were barred by the statute of limitations, Glass failed to address this issue in his initial brief to this Court. Because he failed to raise this issue concerning the timeliness of his claims against these two defendants, Glass waived the issue on appeal. *See* Fed. R. App. P. 28(a)(4); *Rowe v. Schreiber*, 139 F.3d 1381, 1382 n.1 (11th Cir. 1998). We, therefore, dismiss the appeal as to Cagle's Inc. and Cagle's Farms.

Glass alleged the following six claims against Cagle Foods: (1) violation of the Packers and Stockyard Act (PSA); (2) fraud; (3) violation of Georgia RICO; (4) fraud in the inducement and promissory estoppel; (5) violations of the Agricultural Fair Practices Act (AFPA); and (6) breach of contract. After careful scrutiny of the extensive record, the district court entered summary judgment for Cagle Foods on each claim. We review each claim *de novo*. *See Evanston Ins. Co. v. Stonewall Surplus Lines Ins. Co.*,111 F.3d 852, 858 (11th Cir. 1997).

Glass's PSA claim fails. Although Glass argues that Cagle Foods violated the PSA by providing him with inferior birds and feed, and improperly weighing birds, Glass presented no admissible evidence to support these arguments. Glass also erroneously argues that the offer by

Cagle Foods of a raise in exchange for signing an arbitration contract violates the PSA. As explained by the district court, the arbitration contracts did not violate the PSA because the contacts were offered to all growers. The district court properly granted summary judgment on Glass's PSA claim.

Glass's fraud claim fails for the same reasons his PSA claim fails: he did not present any admissible evidence that Cagle Foods engaged in the conduct alleged. Moreover, Glass did not present any evidence that he suffered any damages on account of the alleged fraud. The district court properly granted summary judgment on Glass's fraud claim.

Glass's RICO claim under Georgia law also fails because Glass has not shown a pattern of racketeering activity, a necessary element of the cause of action. *See* Ga. Code Ann. § 16-14-4. Glass relies on mail fraud or theft by deception and employs the same allegations that he contends support his fraud claim. Again, Glass did not produce any admissible evidence to support this claim. The district court properly granted summary judgment on Glass's RICO claim under Georgia law.

Glass's fraud in the inducement claim also fails because he did not establish the elements of the cause of action. Glass erroneously argues that he was "induced . . . into building and expanding his poultry operation" based on written and oral representations made by Cagle Foods. The evidence shows that the written projections contained a clear disclaimer, and Glass's argument is belied by the merger clause in every agreement between Cagle Foods and Glass. Glass also has not presented any evidence that the projections were inaccurate; indeed the record shows

that Glass independently researched the projections and concluded that they were accurate. The district court correctly entered summary judgment against Glass's claim of fraud in the inducement.

Glass's promissory estoppel claim fails as a matter of law because that equitable doctrine is unavailable when there is a written contract between the parties covering the disputed promises. *See, e.g., Christensen v. Intelligent Sys. Master Ltd. P'ship*, 399 S.E.2d 495, 496 (Ga. App. 1990); *Bank of Dade v. Reeves*, 354 S.E.2d 131, 133 (Ga. 1987). "Promissory estoppel is not a legal doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract." *General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1042 (6th Cir. 1990). The district court properly granted summary judgment on Glass's promissory estoppel claim.

Glass's AFPA claim fails because Glass presented no evidence that Cagle Foods or its agents discriminated against him for organizing or participating in a poultry organization. Glass testified that he was not harassed by Cagle Foods or its agents for participating in the association. Glass also did not present any evidence of retaliation. The district court properly granted summary judgment on Glass's AFPA claim.

Finally, Glass's breach of contract claim fails because the undisputed evidence shows that Cagle Foods did not breach the grower contracts with Glass and Cagle Foods met all of its contractual obligations. The district court properly granted summary judgment on Glass's breach of contract claim.

The judgment of the district court is **AFFIRMED** as to Cagle Foods. The appeal is **DISMISSED** as to Cagle's, Inc. and Cagle's Farms.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15444
Non-Argument Calendar

D.C. Docket No. 01-00160-CV-WLS-1

RICHARD WHEELER III,

Plaintiff-Counter-
Defendant-Appellant

versus

CAGLE FOODS JV, LLC
d.b.a. CAGLE-KEYSTONE
FOODS, LLC,

Defendants-Counter-
Claimants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(June 8, 2005)

Before BIRCH, BARKETT and PRYOR, Circuit Judges.

PER CURIAM:

Richard Wheeler, a poultry farmer, appeals the summary judgment entered for Cagle Foods JV, LLC, and argues that genuine issues of material fact remain regarding each of his six claims. Wheeler's appeal is virtually

identical to an appeal filed by another poultry farmer that this Court resolved recently. *See Glass v. Cagle's Inc. et al.*, No. 04-15431 (11th Cir. April 5, 2005) (unpublished). The claims against Cagle Foods are identical, as are the lawyers and the district judge. Our resolution of this appeal is also the same: we affirm.

Wheeler alleged the following six claims against Cagle Foods: (1) violation of the Packers and Stockyard Act (PSA); (2) fraud; (3) violation of Georgia RICO; (4) fraud in the inducement and promissory estoppel; (5) violations of the Agricultural Fair Practices Act (AFPA); and (6) breach of contract. After careful scrutiny of the extensive record, the district court entered summary judgment for Cagle Foods on each claim. We review each claim *de novo*. *See Evanston Ins. Co. v. Stonewall Surplus Lines Ins. Co.*, 111 F.3d 852, 858 (11th Cir. 1997).

Wheeler's PSA claim fails. The PSA prohibits "unfair, unjustly discriminatory, or deceptive practices or devices," or "any undue or unreasonable performance or advantage." 7 U.S.C. §§ 192(a) and (b). Although Wheeler argues that Cagle Foods violated the PSA by providing him with inferior birds and feed and improperly weighing birds, Wheeler presented no admissible evidence to support these arguments. As to his complaint of inferior birds, Wheeler has received numerous bird deliveries beginning in 1994 and he never noted the alleged deficiencies on the delivery reports or kept any separate record of these deficiencies. Moreover, we agree with the district court that Cagle Foods produced "unrefuted evidence that it is virtually impossible for Cagle [Foods] to target specific farms for delivery of inferior birds." As to his complaint of insufficient and inferior feed, Wheeler did not identify one instance where he was charged for feed he did not receive,

and he admitted that he consistently checked his feed inventory to verify feed deliveries. As to his complaint about improper weighing of birds, we agree with the district court that a reasonable reading of the evidence attributes any improper weighing to "sporadic failures of drivers to follow the rules or problems causing the plant to shut down temporarily," none of which violated the PSA. Moreover, the deposition testimony on which Wheeler relies shows that other weighing discrepancies ended several years before Wheeler became a grower.

Wheeler also erroneously argues that the offer by Cagle Foods of a raise in exchange for signing an arbitration contract violates the PSA. As explained by the district court, the arbitration contracts did not violate the PSA because the contracts were offered to all growers. The district court properly granted summary judgment on Wheeler's PSA claim.

Wheeler's fraud and Georgia RICO claims fail for the same reasons his PSA claim fails: he did not present any admissible evidence that Cagle Foods engaged in the conduct alleged. Moreover, as to his fraud and RICO claims, Wheeler did not present any evidence that he suffered any damages. The district court properly granted summary judgment on Wheeler's fraud and Georgia RICO claims.

Wheeler's fraud in the inducement claim also fails because he did not establish the elements of the cause of action. Wheeler erroneously argues that Cagle Foods "induced him to purchase an unsuccessful farm and to borrow hundreds of thousands of dollars by providing net income information that it knew to be false and inaccurate." Wheeler's argument is belied by the merger clause

in every agreement between Cagle Foods and Wheeler. Moreover, the record shows that Wheeler independently researched the projections and found them to be reasonable and accurate. The district court correctly entered summary judgment against Wheeler's claim of fraud in the inducement.

Wheeler's promissory estoppel claim fails as a matter of law because that equitable doctrine is unavailable when there is a written contract between the parties covering the disputed promises. *See, e.g., Christensen v. Intelligent Sys. Master Ltd. P'ship*, 399 S.E.2d 495, 496 (Ga. App. 1990); *Bank of Dade v. Reeves*, 354 S.E.2d 131, 133 (Ga. 1987). "Promissory estoppel is not a legal doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract." *General Aviation, Inc. v. Cessna Aircraft Co.*, 915 F.2d 1038, 1042 (6th Cir. 1990). The district court properly granted summary judgment on Wheeler's promissory estoppel claim.

Wheeler's AFPA claim fails because Wheeler presented no evidence that Cagle Foods or its agents interfered with his attempt to organize and participate in a grower or poultry association or discriminated against him for such participation. Wheeler testified that he was not harassed by Cagle Foods or its agents for participating in the association. Wheeler also did not present any evidence of retaliation. The district court properly granted summary judgment on Wheeler's AFPA claim.

Finally, Wheeler's breach of contract claim fails because the undisputed evidence shows that Cagle Foods did not breach the grower contracts with Wheeler, and Cagle Foods met all of its contractual obligations. In fact,

Cagle Foods increased Wheeler's payment per pound, and Wheeler earned near the projected amount, or more, during the life of the contract. The district court properly granted summary judgment on Wheeler's breach of contract claim.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11447

D. C. Docket No. 01-00126-CV-2-WLS-1

LUCIUS ADKINS
JILL ADKINS,

Plaintiffs-Counter-
Defendants-Appellants,

versus

CAGLE FOODS JV, LLC,
d.b.a. Cagle-Keystone Foods,

Defendant-Counter-
Claimant-Appellee,

CAGLE'S, INC.,
CAGLE'S FARMS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(Filed June 13, 2005)

Before EDMONDSON, Chief Judge, and TJOFLAT and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

This case involves an interpretation of the Packers & Stockyards Act, 7 U.S.C. § 192(a) and (b), which prohibits live poultry dealers from "engag[ing] in or us[ing] any unfair, unjustly discriminatory, or deceptive practice or device," or "mak[ing] or giv[ing] any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject[ing] any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect". The plaintiffs, Lucius and Jill Adkins, are broiler growers under contract with defendant operators of poultry processing facilities. The Adkins claim that the defendants, Cagle's, Inc. ("Cagle's"), Cagle's Farms, Inc. ("Cagle's Farms"), and Cagle Foods JV, LLC ("Cagle JV"), violated federal agricultural statutes, committed state-law fraud and breach of contract, and are liable under other related causes of action.

I.

The plaintiffs, Lucius and Jill Adkins, had been engaged in farming for several years when they decided, in late 1990 or early 1991, to grow broiler chickens in order to diversify their farm income.[1]

[1] The various defendants operate an integrated poultry processing business. They contract some farmers, known as "breeder growers," to raise hens for the express purpose of laying eggs. These eggs are then hatched at a hatchery. Soon after the eggs are hatched, the young chicks are sent to a "broiler grower," like the Adkins. Under the basic terms of a Broiler Production Agreement, the broiler grower supplies the chicken houses and does the farm work necessary to raise the chicks, while the defendants supply feed and medications. After a predetermined period, the defendants collect the grown chickens from the broiler grower and weigh them. The broiler growers are paid

(Continued on following page)

Lucius[2] met with Danny Eiland of Cagle's, who provided estimates of typical costs and expenses encountered in the business, derived from industry averages and actual production data on other farms. The estimates included a disclaimer which provided that the projections were for illustrative purposes only and not intended as a forecast of actual performance. The Adkins independently verified the validity of the estimates and proceeded to construct four chicken houses in 1991. The estimates proved reasonably accurate and the operation performed well. The Adkins constructed two additional houses in 1994, and four more houses on a new farm in 1995. On each occasion, the Adkins obtained additional estimates from Cagle JV, which by that time was the only one of the defendant entities conducting business with the Adkins.[3]

By the time of the 1994 house construction, Cagle JV had responded to market pressures by providing its broiler growers with larger birds, which resulted in a reduction in the number of flocks per year from the 1991 estimated figures. Lucius admitted in a deposition that the Adkins did not suffer any damages as a result of the change, and that Cagle JV's actions in making the change were not fraudulent. Furthermore, Lucius believed the new estimates

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according to a formula which depends primarily on the weight of the grown birds and the weight of feed used. The defendants then slaughter the chickens, process the meat, and sell it.

[2] To avoid confusion, and with all due respect, we refer to the Adkins individually throughout this opinion as "Lucius" or "Jill" as appropriate.

[3] Cagle JV came into existence in 1993 as a joint venture between Cagle's and another company in order to expand poultry processing facilities in south Georgia. All the Adkins' dealings after October 1993 were with Cagle JV.

he received before the 1995 construction to be accurate and reasonable.

The relationship between Cagle JV[4] and its growers was memorialized in a series of Broiler Production Agreements, which set forth the obligations of Cagle JV to provide the birds, feed, and medications, and to weigh the birds promptly upon harvest. The agreement also set out the pay schedule for the duration of the contract. No contract ever specified the specific number of birds to be placed in each house or the number of flocks per year. All the contracts contained merger clauses.

In 1996, in response to requests from its largest customer, Cagle JV began placing an even larger bird with its growers. In order to preserve the health of the bird, and for other reasons, Cagle JV decreased the number of birds placed in each house. The Adkins made no complaints at the time. The increase in bird size made up for the lower number of birds. Furthermore, Cagle JV's payment per pound increased from 3.95 cents to 4.8 cents between 1997 and 2004.

In May 1996, the Grain Inspection, Packers and Stockyard Administration (GIPSA) found that up until 1995, Cagle JV had used different tractors to take the loaded weight and the tare weight of chicken trailers. Cagle JV therefore recalculated its prior payments to correct for the discrepancy. Cagle JV reimbursed the Adkins and other farmers who had been underpaid, but did not request refunds from farmers who had been overpaid.

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[4] Before October 1993, the Broiler Production Agreements were between the Adkins and Cagle's.

Lucius Adkins joined the United Poultry Growers' Association ("UPGA") in 1997, and became the UPGA president in November 1998. At about the same time that Lucius became involved in the UPGA, the Adkins allege that Cagle JV began sending them poor quality birds to raise on their farms. The Adkins also claim that Cagle JV sometimes sent them poor quality feed for the birds or failed to send sufficient feed. Lucius asserts that employees of Cagle JV repeatedly threatened that he should do as the company told him or the company would "break" him. The Adkins claim that these threats were meant to discourage participation in the UPGA.

In May 1999, Cagle JV presented all its growers a new contract which provided for higher payments in exchange for an agreement to arbitrate disputes arising under the contract. The Adkins rejected this proposal and continued to do business under the old contract.[6]

In June 2001, the Adkins filed the present action in the Middle District of Georgia against Cagle JV, Cagle's, and Cagle's Farms. The complaint brought claims for (1) violation of the Packers and Stockyards Act ("PSA"), (2) fraud, (3) violation of the Georgia RICO statute, (4) fraudulent inducement and promissory estoppel, (5) violation of the Agricultural Fair Practices Act ("AFPA"), and (6) breach of contract. In response, Cagle's, Inc., and Cagle's Farms, Inc. filed a motion for summary judgment arguing, *inter alia*, that they had not had dealings with the Adkins since 1993 and that the Adkins' claims were

[6] In April 2002, after the Adkins commenced this litigation, Cagle offered a different contract. The new contract provided for an arbitration option but included a higher rate for growers regardless.

therefore time-barred. The district court granted the motion. Cagle JV filed a motion for summary judgment on the merits of the Adkins' claims. The district court granted Cagle JV's motion as well. The Adkins appeal both rulings.

II.

A. Standard of Review

We review the district court's grant of a motion for summary judgment *de novo*. *Hinson v. Clinch County Board of Education*, 231 F.3d 821, 826 (11th Cir. 2000). The moving party bears the initial burden of showing that there is an absence of a genuine issue of material fact and that it is therefore entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the non-moving party must show the existence of a genuine issue of material fact that remains to be resolved at trial. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). The non-moving party must set forth specific facts showing that there is a genuine issue for trial, not merely make a summary denial of the movant's allegations. Fed. R. Civ. P. 56(e).

B. The Adkins' Claims Against Cagle Foods JV

1. Packers and Stockyards Act Claim

The PSA prohibits live poultry dealers from "engag[ing] in or us[ing] any unfair, unjustly discriminatory, or deceptive practice or device," or "mak[ing] or giv[ing] any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject[ing] any particular person or locality to any undue or unreasonable

prejudice or disadvantage in any respect". 7 U.S.C. § 192(a) and (b).[6] The Adkins have alleged that Cagle JV violated this statute when it (1) provided them with inferior birds, (2) provided them with inferior or insufficient feed, (3) improperly weighed birds they had raised, and (4) offered them an unfair arbitration contract.[7]

There is no evidence that the Adkins received a substantial number of inferior birds, much less that Cagle JV intended to provide them with poor quality birds. The Adkins did demonstrate that Cagle JV could choose to send buses of chicks to different farms once they were loaded, but this falls far short of a showing that Cagle JV discriminated against the Adkins by sending them inferior birds. Uncontroverted evidence states that flocks were only sent to a different farm when the original destination farm was not yet ready to receive them. Chick quality is also a complex matter which cannot be determined at a glance, meaning that it would be difficult to judge the quality of a flock when loaded onto a bus for transport. Nothing in the record suggests that Cagle JV ever delivered poor quality chicks to the Adkins or any other broiler growers with any discriminatory purpose.

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[6] The interpretation of this provision of the Packers and Stockyards Act is a matter of first impression for this court. The existing case law does not serve to further define the terms used in the statute, and primarily concerns cases of price discrimination in the meat-packing industry. *See generally Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968).

[7] We do not decide whether these factual allegations, if proved, would establish a violation of the PSA. For the present case, it is sufficient for us to hold that the district court was correct in finding that the Adkins did not prove their allegations, and that the few facts they did produce were clearly insufficient to make out a PSA claim.

Nor have the Adkins produced evidence of specific instances where Cagle JV gave them insufficient or inferior feed. The evidence did suggest that some of Cagle JV's broiler farms would run out of feed from time to time while others received too much. But the Adkins did nothing to show that they were ever specifically targeted for insufficient or inferior feed.

The Adkins have also failed to establish any illegal weighing practices. In the earlier years of the Camilla plant's operation, there were discrepancies in the weighing process that might affect the live weight. Cagle JV made reimbursement payments to cover all misweighings prior to 1995, and the Adkins cannot identify any instances where Cagle JV misweighed their birds after 1995.

Beginning in 1999, Cagle JV offered broiler growers a new form of Broiler Production Agreement which contained an arbitration clause. The Adkins allege that these arbitration contracts were unfair. At first the arbitration contracts were made available to all broiler growers, at their option, with a higher rate of pay for those who accepted them. The contracts were changed later so that all growers received the same pay, with arbitration still at the grower's option. There is nothing unfair or discriminatory about Cagle JV's offer of a higher rate of pay in consideration for arbitration. Furthermore, contrary to the Adkins' assertion, there is no evidence that Cagle JV ever "guaranteed" the Adkins a pay increase which they were later "denied" because of their failure to sign the arbitration contract.

2. Fraud Claim

To sustain a fraud claim under Georgia law, the plaintiff must show (1) a false representation made by the defendants; (2) scienter, or knowledge of the statement's falsity at the time it was made; (3) an intention to induce the plaintiff to act or refrain from acting in reliance on the statement; (4) the plaintiff's justifiable reliance; and (5) damage to the plaintiff. *Pro-Fab v. Vipa, Inc.*, 772 F.2d 847, 851 (11th Cir. 1985). The Adkins claim that Cagle JV committed four types of intentional and false acts: (1) recording false trailer weights; (2) recording false tare and gross weights; (3) failing to promptly weigh the Adkins' birds; and (4) providing inferior birds

In their brief to this court, the Adkins assert that if there is slight, circumstantial evidence supporting a fraud claim, that claim should be tried to a jury. This is a correct statement of Georgia law on the scienter element of fraud, but not on all elements of a fraud claim. *Ades v. Werther*, 256 Ga. App. 8 (2002); *Quill v. Newberry*, 238 Ga. App. 184 (1999). Before scienter is reached, the Adkins must identify a false representation.

The Adkins have not identified any false representation. As noted *supra*, there is no evidence of any intentional misweighing of the Adkins' birds, or of intentional deliveries of poor quality birds or feed to the Adkins. Any discrepancies caused by the improper weighing procedures used before 1995 were corrected by Cagle JV's reimbursement payments. Furthermore, the estimates Danny Eiland originally provided the Adkins contained express disclaimers that they were not to be taken as a guarantee of future performance and therefore cannot be fraudulent misrepresentations, even though the company later

decided to change the size of the birds and the number of birds per house.

3. Georgia RICO Claim

To prove a violation of the Georgia RICO statute, the Adkins must demonstrate two or more predicate acts which are related and have continuity. *Pelletier v. Zweifel,* 921 F.2d 1465, 1513 (11th Cir. 1991); O.C.G.A. § 16-14-3(8). The Adkins have attempted to prove federal mail fraud and state-law theft by deception.

To prove a violation of the federal mail fraud statute, the Adkins must show that Cagle JV "(1) intentionally participate[d] in a scheme to defraud another of money or property and (2) use[d] the mails or wires in furtherance of that scheme." *Pelletier,* 921 F.2d at 1498. To prove theft by deception under Georgia law, the Adkins must demonstrate that Cagle JV had criminal intent and knowledge. *Avery v. Chrysler Motors Corp.,* 214 Ga. App. 602 (1994). The Adkins relied on the same facts for these claims as for their fraud claim. Because we have found that Cagle JV did not make any fraudulent or deceptive communications or have any kind of criminal intent, the Adkins' claim fails. The Adkins also claim that Cagle JV committed mail fraud by mailing fraudulent final statements to them. However, the Adkins have not identified any statement which was allegedly fraudulent.

4. Fraudulent Inducement and Promissory Estoppel Claims

Georgia law is clear that "fraud cannot be predicated upon statements which are promissory in their nature as to future acts." *Warner v. Jeter,* 115 Ga. App. 6, 7 (1967);

see also Smith v. McClung, 215 Ga. App. 786, 788 (1994) (holding that "representations concerning expectations and hopes are not actionable"). Georgia courts also have held that, absent something more, a promise that a business could be expected to generate a certain income does not constitute fraud. *See Krys v. Henderson*, 85 Ga. App. 323, 325 (1952).

The Adkins contend that Cagle JV's initial estimates regarding the future performance of their farms were intentional misrepresentations which can establish a predicate for fraudulent inducement. The Adkins' argument fails, however, because of both the rule in *Warner* and the language included in each estimate disclaiming any representation as to future performance. Nor is there any evidence in the record that Cagle JV misrepresented anything in its estimates, intentionally or otherwise.

The Adkins also claim that the initial estimates constituted promises which were enforceable by the doctrine of promissory estoppel. Under Georgia law such an estoppel requires a showing that (1) the defendant made certain promises, (2) the defendant should have expected that the plaintiffs would rely on such promises, and (3) the plaintiffs did in fact rely on such promises to their detriment. *Doll v. Grand Union Co.*, 925 F.2d 1363 (11th Cir. 1991). Importantly, where a plaintiff seeks to enforce an underlying contract which is reduced to writing, promissory estoppel is not available as a remedy. *Bank of Dade v. Reeves*, 257 Ga. 53 (1987). Furthermore, promissory estoppel does not apply to representations concerning the future, but to representations of past or present facts. *Voyles v. Sasser*, 221 Ga. App. 305, 305-306 (1996).

The series of Broiler Production Agreements between Cagle JV and the Adkins all contained merger clauses; thus, if the estimates were enforceable at all, it must have been as a part of those agreements. Nothing in the agreements incorporated the initial estimates. Moreover, because the agreements were written they could not be enforced by promissory estoppel. Furthermore, the fact that the estimates concerned the future also precluded their enforcement by promissory estoppel.

5. Agricultural Fair Practices Act Claim

The Adkins further contend that Cagle JV violated the AFPA by interfering with their attempt to organize and participate in a growers' association and discriminating against them for such participation. Cagle JV concedes that if it engaged in such behavior, it would be in violation of the AFPA. *See* 7 U.S.C. §§ 2301-2305.

The Adkins, however, produced no evidence that any employee of Cagle JV ever harassed them regarding their efforts to organize and participate in a growers' association. Though Cagle JV representatives sometimes attended growers' association meetings, those meetings were public and the representatives never attempted to interfere in the organization's affairs. Nor did the Adkins put forth significant evidence of discrimination. They presented a statistical regression analysis (which the district judge gave little attention and which cannot establish a causal link) and isolated comments by Cagle JV representatives which do not appear to be connected to the growers' association issue. As noted *supra*, there is no evidence of any systematic attempt to provide the Adkins with inferior

birds or feed, to use improper weighing procedures, or to force the Adkins to sign the arbitration contract.

6. Breach of Contract Claim

The Adkins finally claim that Cagle JV breached its successive Broiler Production Agreements with them. They offer no new evidence or arguments to advance this claim, but rest on the same allegations of wrongdoing they cited in prior claims.

As Cagle JV specifically notes in its briefs to this court, nothing in the agreements required that the Adkins receive a specific number of flocks per year or birds per house. We have already concluded that Cagle JV did not intentionally misweigh birds, intentionally give the Adkins poor quality birds, intentionally provide the Adkins with inferior feed, or defraud the Adkins. The Adkins can point to no contractual provision which Cagle JV has breached.

We therefore affirm the district court's dismissal of the Adkins' claims against Cagle Foods JV.

C. The Adkins' Claims Against Cagle's, Inc. and Cagle's Farms, Inc.

The district court found that the Adkins' claims against Cagle's and Cagle's Farms were barred by the applicable statutes of limitations. For the fraud claim, the applicable statute of limitations is four years. O.C.G.A. §§ 9-3-25, 9-3-26, 9-3-31. The Adkins' fraud claim against Cagle's and Cagle's Farms was based on projections made by Danny Eiland in 1992 and 1993, eight years before the Adkins filed the present complaint. *See Denson v. Maloy*, 239 Ga. App. 778, 779 (1999) (fraud statute of limitation

runs from date injury occurs). The Adkins offer no argument in their briefs on appeal as to why the statute of limitations does not apply. Furthermore, their fraud claim is baseless. The income projections that Cagle's and Cagle's Farms originally provided the Adkins – and on which the Adkins base their claim – contained a disclaimer which made clear that they were "for illustrative purposes only and . . . not intended as a projection or forecast of actual performance." Even if the Adkins' claim were not barred by the statute of limitations, Georgia law is clear that "fraud cannot be predicated upon statements which are promissory in their nature as to future acts." *Warner v. Jeter,* 115 Ga. App. 6, 7 (1967).

The statute of limitations for the AFPA claim is two years. 7 U.S.C. § 2305(c). The Adkins' AFPA claim is based on a conversation between Doug Cagle and Lucius Adkins on December 30, 1998 – three and a half years before the instant complaint was filed. The Adkins do not address this issue in their briefs or present any argument as to why the claim is not time-barred.

The district court was therefore correct in granting summary judgment for Cagle's and Cagle's Farms and dismissing the Adkins' claims against them.

D. Cagle's, Inc. and Cagle's Farms, Inc.'s Motion for Sanctions

Cagle's Inc. and Cagle's Farms, Inc. have moved for sanctions under Rule 38 of the Federal Rules of Appellate Procedure. They contend that this appeal was frivolous as to them. Although we hold that the statute of limitations applied to bar the Adkins' claim against Cagle's and

Cagle's Farms, the Adkins' appeal was not frivolous. We therefore deny the motion for sanctions.

III.

For the foregoing reasons, we AFFIRM the district court's grants of summary judgment for all the defendants and DENY Cagle's, Inc. and Cagle's Farms, Inc.'s motions for sanctions.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11570

D.C. Docket No. 01-00130 CV-2-WLS-1

TRAVIS MIMS, Plaintiff-Counter-Defendant-Appellant,

versus

CAGLE FOODS JV, LLC, d.b.a. Cagle-Keystone Foods, Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(June 15, 2005)

Before ANDERSON and WILSON, Circuit Judges, and JORDAN*, District Judge.

PER CURIAM.

In this case, chicken grower Travis Mims alleges that Cagle Foods JV ("Cagle"), a chicken processing company, violated the Packers & Stockyards Act ("PSA"), 7 U.S.C. § 181 et seq., the Agricultural Fair Practices Act, 7 U.S.C. § 2301 et. seq., and the Georgia Racketeer Influenced &

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* Honorable Adalberto Jordan, United States Judge for the Southern District of Florida, sitting by designation.

Corrupt Organizations Act, O.C.G.A. § 16-14-4 (2004), in a variety of ways. Mims also alleges claims for breach of contract, fraud, fraud in the inducement, and promissory estoppel. The district court granted summary judgment to Cagle on all claims, holding that Mims produced insufficient evidence to create a genuine issue of material fact with respect to his claims. After oral argument and careful consideration, we agree that Mims has not produced sufficient evidence to create a genuine issue of material fact. Accordingly, we affirm.

I. FACTS

Cagle provides growers with baby chicks (known as "broilers") along with the necessary feed and medication, and, in return, the growers provide care and oversight for the broilers during the chicks' "grow-out." At the end of the grow-out, Cagle takes the broilers to its processing plants, weighs the truck full of birds, deducts the weight of the crates and the truck, and determines the weight of the broilers. The grower is compensated by a formula that compares his cost per pound against similarly situated growers during the relevant time period. In order for the settlement to be correct, the number of birds must be accurately stated, the feed must be accurately accounted for, and the weight of the finished birds must be true and accurate. "Feed conversion," how much feed it takes to produce the chicken, is the most important factor in the determination of the pay formula.

Mims worked as a grower for Cagle, raising chickens on his own farm from 1994 through 2001, and for another owner, James Tyson, from 1999 through 2001. In 1994, Mims entered into a contract with Cagle to build four

chicken houses. The agreement enumerated Cagle's obligations, but contained no reference to the specific numbers of birds to be placed, the numbers of flocks per year, the types of birds, or income or expense figures. The contract contained the merger clause:

> This Agreement constitutes the entire agreement between the parties and includes all promises and representations, express or implied, made by the Company and the Producer and by either of them. Any prior oral or written representations not expressly set forth in this Agreement are hereby cancelled and are no longer of any force or effect. This Agreement may not be altered in any manner except by a written instrument signed by both parties.

Mims' houses were completed and he received his first flock in August 1994. In the summer of 1997, Mims' flock placements were cut from 25,000 per house to 22,500 per house because Cagle had decided to use larger birds. At the same time that Cagle reduced its flock placement, it increased grower pay from 4.3 cents per pound to 4.5 cents per pound.

In 1998, Mims became active in the United Poultry Growers Association ("UPGA"). In May 1999, Cagle offered all growers an option to enter into a new contract at a higher payment rate in exchange for an agreement to arbitrate all disputes. Mims refused to sign the new contract, and opted to forego the raise and to continue his relationship with Cagle under the existing contract.

In 1999, Mims began managing a six house farm owned by James Tyson pursuant to an agreement between Mims and Tyson. Cagle concluded that Mims' performance was sub-par. Cagle began to provide copies of Service

Reports to Tyson. Mims was aware the Service Reports were being forwarded, saw copies of all reports, had an opportunity to respond, but did not.

Mims decided to put his own farm on the market in the fall of 2000, but planned to continue working for Tyson. On October 16, 2000, Mims told a Cagle employee that he wanted to put his farm on the market, and that he did not want to continue to grow chickens. Mims subsequently changed his mind. When Mims' flock was picked up in November of 2000, he was told that he was not on the placement schedule to receive another flock, so he requested that his flock supervisor put him on the schedule. Cagle agreed to place another flock after Mims made some repairs. Cagle placed Mims' next flock on January 15, 2001. After the flock placed on Mims' farm in January 2001, Cagle terminated Mims' contract. In late 2000 a Cagle employee told Tyson that Cagle would not put any more birds in his houses as long as Mims was the manager.[1] Tyson decided to get out of the business and sold his farm in Spring of 2001.

II. DISCUSSION

A. Packers and Stockyards Act Claims

Mims argues that the district court erred by granting Cagle's motion for summary judgment on his Packers & Stockyards Act Claims. Mims argues that after joining the UPGA and refusing to sign the arbitration contract, his performance declined. Mims argues that the decline in his

[1] Cagle disputes this, but for the purpose of summary judgment we take the facts in the light most favorable to the plaintiff.

performance can be attributed to Cagles' retaliation toward Mims for joining the UPGA and refusing to sign the arbitration contract. Mims argues that he produced evidence creating a genuine issue of material fact of each of the following: (1) Cagle provided him with sick and unhealthy birds in retaliation for joining the UPGA in 1998, and for refusing to sign an arbitration contract in 1999; (2) Cagle delayed feed deliveries in retaliation; (3) Cagle engaged in various dishonest weighing practices that damaged Mims during the entire course of its relationship with Mims; and (4) the arbitration contract that was offered by Cagle violated the PSA because it was unconscionable and constituted a "bait and switch."[2]

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[2] Mims also argues that Cagle failed to move for summary judgment on all grounds that formed the basis for Mims' PSA claim, and therefore the district court inappropriately granted summary judgment on these claims. Specifically, Mims states that the following allegations that could support a PSA claim were not addressed by Cagle or the district court: (1) termination of Mims' contract without economic justification; (2) Cagle's ceasing to place flocks with Mims during late 2000 without cause; and (3) Cagle's making of false statements to Mims' employer Tyson and pressuring him to terminate his relationship with Mims. However, Cagle discussed each of these issues in the factual statement of its brief in support of summary judgment, and stated, "An analysis of the 'evidence' presented by plaintiff makes clear that he has not proven any of his laundry list of alleged discriminatory acts." Cagle's statement that Mims has not proven any of his laundry list of alleged discriminatory acts constitutes a motion for summary judgment on all grounds that could serve as the basis of his PSA claim. We conclude that the district court properly found that Mims lacked sufficient evidence to support his PSA claim. There is nothing to indicate that Cagle made false statements to Tyson. Cagle stopped placing flocks with Mims at Mims' request. Termination of a contract without economic justification is insufficient to sustain a claim under the PSA absent a showing of anticompetitive effect. *See London v. Fieldale Farms Corp.*, ___ F.3d ___, 2005 WL 1279147 at *5 (11th Cir. June 1, 2005).

The Packers and Stockyards Act prohibits "unfair, unjustly discriminatory, or deceptive practices or devices with respect to live poultry." 7 U.S.C. § 192. We assume *arguendo* that Mims is entitled to a jury on his PSA claim if he could produce evidence sufficient to raise a genuine issue with respect to any of his factual allegations. However, we conclude that Mims has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual allegations.

Mims claims that Cagle provided him with sick and unhealthy birds in retaliation for joining the UPGA in 1998, and for refusing to sign an arbitration contract in 1999. Mims makes the vague and conclusory statement that "it was made clear to [him]" that some people had lost farms for being a problem, but admits that he does not know of any farmers who lost their farm, and he does not cite any specific instances of coercion, harassment, or discrimination. Mims and some of his employees provided deposition testimony stating that Mims received a significant number of "bad looking birds"; however, both Mims and his employees testified that this occurred both before and after Mims joined the UPGA and refused to sign the arbitration contract.[3] Furthermore, Mims had not recorded any problem on his chick delivery reports. While Mims provided some weak evidence[4] suggesting that Cagle may

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[3] We also note that Mims' own expert produced a regression analysis that suggested, at best, Mims' membership in the UPGA could explain only 1% of Mims' decreasing performance.

[4] The strongest of this evidence was an affidavit from a former chick bus driver who worked for Cagle from 1996-97. The driver's affidavit merely stated that he recalled chick deliveries being changed from one farm to another and being told that certain houses were not ready and he needed to take the chicks to another farm. He also noted

(Continued on following page)

have had some control over where particular flocks were placed, he produced no evidence suggesting that Cagle targeted him to receive poor flocks or even suggesting a likelihood of it. In short, Mims produced insufficient evidence suggesting that he received more had birds than other growers because of retaliation.

Next, Mims alleges that Cagle delayed feed and chick deliveries, and terminated Mims' contract in retaliation for Mims' participation in the UPGA and for his refusal to sign a contract that included an arbitration clause. The only evidence Mims offers to support this claim is the affidavit of a former feed mill manager who stated that, at the request of his managers, he would create feed credit tickets so as to change weekly settlements, and that he believed that the managers were "manipulating the growout settlements to help certain growers and hurt other growers." The former feed mill manager also stated that managers would discuss the leaders of the growers' association during management meetings, and would have discussions about pressuring growers who would not sign a contract with the arbitration clause to sign the contract. However, nothing in his affidavit provides evidence of any retaliation against Mims, and as noted below, there is not other evidence which might create a jury question.

Mims, however, offers nothing more than his personal belief that his growout settlements were inaccurate. Mims did not document times that he ran out of feed, but merely states that it happened often. The one instance that Mims

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that most farms would receive chicks from one to three breeder flocks, but that one particular grower received chicks from a variety of different breeder flocks and often complained about the chick quality.

could recall running out of feed for a significant period of time happened due to a bomb threat at the Cagle plant, and occurred in 1995, well before he joined the association or refused to sign the arbitration contract. Mims only testifies to one instance in which he was charged for feed he did not receive. The instance involved confusing circumstances, and Mims offers nothing to suggest that the charge was anything more than a reasonable mistake. Mims argues that Cagle delayed flock deliveries in retaliation, but the only delay he cites happened after Mims had indicated that he did not want a bird placement, subsequently changed his mind, and Cagle had advised him to make repairs to his farm before it would place another flock. We simply do not see how a reasonable juror could conclude that Mims was retaliated against on the basis of this evidence.

Mims states that his flock supervisors issued harsher reviews after Mims joined the association, but Mims does not point to any false statements on those reviews, but merely objecting to what he considered to be "nitpicking." Similarly, with respect to the termination of Mims' contract, there is little to indicate that Cagle terminated Mims' contract for any reason other than it perceived him to be a poor manager.

Third, Mims alleges that Cagle engaged in various dishonest weighing practices that damaged Mims during the entire course of its relationship with him. Mims states that he is "unable to point to specific instances of improper weighing because it was Cagle's policy and practice to prevent growers from discovering its fraudulent weighing practices by requiring appointments to observe the weighing process." Cagle had a policy that "[a]ny grower wanting to see their birds weighed must have authorization

from management to enter the property" for "proper security at our operation." Mims states that requiring appointments to view weighings violated federal regulation 9 C.F.R. § 201.108-1(e)(4) because it impeded the "unfettered observation" to which the growers were entitled. § 201.108-1(e)(4) states that growers are entitled to observe balancing, weighing, and recording procedures, and precludes weighers from denying growers that opportunity. Mims admitted that he could have scheduled an appointment to watch his birds being weighed, but that he never did so. Nothing in 9 C.F.R. § 201-108-1(e)(4) suggests that requiring appointments for security purposes is precluded or even discouraged. As such, this does not constitute evidence that Cagle misweighed Mims' birds.

The only other evidence Mims presents with respect to misweighing relates to procedures at the plant before 1996.[6] In 1996, Cagle, working with the Grain Inspection, Packers and Stockyards Administration, modified its problematic weighing procedures, reimbursed growers who may have been underpaid (including Mims), and took a loss on growers who were potentially overpaid. Cagle disclosed the results to growers, and Mims does not produce any evidence indicating that his compensation was insufficient.

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[6] We also note that insofar as this evidence could alone support a claim for a violation of the PSA, such a claim would likely be precluded by the statute of limitations. We decline to rule on this issue, but we note that other circuits have applied a four year statute of limitations to PSA claims and this evidence does not create an issue of fact during the four years prior to 2001, when Mims filed this claim. *See Jackson v. Swift*, 53 F.3d 1452, 1460 (8th Cir. 1995) (holding that district court did not err by applying Sherman Act's four-year statute of limitations, rather than two-year limitations period of Agricultural Fair Practices Act ("AFPA") to claimed PSA violations).

Finally, Mims argues that the district court erred by granting summary judgment on his PSA claims because the arbitration contract that was offered by Cagle was unconscionable and constituted a "bait and switch." Mims' argument is that he received periodic pay increases in 1994 and 1997 pursuant to the same type of contract that he was provided initially, but that in order to receive the pay increase in 1999, he had to sign the contract with the arbitration clause, which he refused to do. This is hardly a "bait and switch" scheme. Mims' original contract did not suggest he would receive periodic pay increases, and there is nothing to indicate that Cagle knew it might provide the option of the arbitration contract in 1994 when it originally contracted with Mims. Additionally, Mims provides nothing to suggest that the offer of the contract itself was unconscionable, other than that he lost the benefit of a pay increase because he refused to sign it.

B. Fraud Claim

Mims argues that the district court improperly granted summary judgment on Mims' fraud claims because Cagle required appointments to watch the weighing process, "kept no records of incidents of improper weighing and concealed its practices by sending false statements to growers." Mims further argues that Cagle committed fraud in its feed practices and by decreasing the number of birds placed on his farm from the number originally promised.

Mims cannot produce evidence that Cagle underpaid him for his flocks other than his hunch that some flocks weighed more than indicated on the statement provided by Cagle. Similarly, Mims does not provide evidence suggesting

that his feed settlements were improper such that he can support an inference of fraud. The only false representation Mims cites to is testimony by Bennie Morris, who indicated some problems with Cagle's weighing procedures, mostly before 1996. Yet Morris expressly testified that Cagle made significant efforts to stop the problematic weighing procedures and did not authorize them. Accordingly, Mims did not create a genuine issue of material fact on his fraud claim and the district court properly granted summary judgment.

C. Georgia RICO Claim

Mims argues that the district court erred by granting summary judgment to Cagle on his claim pursuant to the Georgia Racketeer Influenced and Corrupt Organizations Act ("Georgia RICO Act"). The Georgia RICO Act states that it "is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money." Ga. Code Ann. § 16-14-4 (2004). Mims produces no evidence specific to this claim, and he fails to create a genuine issue of material fact for the same reasons he failed to create an issue in his fraud claims.

D. Promissory Estoppel/Fraud In the Inducement Claim

Mims argues that Cagle engaged in fraud in the inducement in 1994 by indicating 25,000 birds would be placed in his farm. This claim is wholly precluded by the merger clause of the contract. In Georgia, "[a]s a matter of

law, a valid merger clause executed by two or more parties in an arm's length transaction precludes any subsequent claim of deceit based upon pre-contractual representations." *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 785 (Ga. 2001).

Similarly, Mims cannot maintain a claim for promissory estoppel. The contract between Mims and Cagle stated:

> This Agreement constitutes the entire agreement between the parties and includes all promises and representations, express or implied, made by the Company and the Producer and by either of them. Any prior oral or written representations not expressly set forth in this Agreement are hereby cancelled and are no longer of any force or effect.

Georgia courts have consistently held that plaintiffs cannot maintain a claim of promissory estoppel based on pre-contractual promises where the contract expressly cancels those promises or makes reliance on them unreasonable. *See W.R. Grace & Company-Conn. v. Taco Tico Acquisition Corp.*, 454 S.E.2d 789, 791 (Ga. App. 1995) ("This court has consistently held that disclaimers in contracts prevent justifiable reliance on other representations purportedly made by the parties; we perceive no difference between reasonable reliance in promissory estoppel cases and justifiable reliance in other cases sufficient to warrant a different result." (Internal citations omitted)).

E. Agricultural Fair Practices Act

Next, Mims argues that the district court erred by granting summary judgment to Cagle on his claim pursuant to the Agricultural Fair Practices Act, 7 U.S.C. § 2301 et. seq ("AFPA"). The AFPA makes it illegal to discriminate against a grower in a growers' association, as well as to coerce or intimidate a grower with respect to an association. 7 U.S.C. § 2303. Similar to his PSA claim, Mims failed to produce evidence on this claim creating a genuine issue of material fact that Cagle discriminated, coerced, or intimidated him with respect to his membership in a growers' association.

F. Breach of Contract Claim

Finally, Mims argues that the district court erred by granting summary judgment to Cagle on his breach of contract claim. Mims does not point to any specific provision in the contract that was breached. In his deposition, Mims acknowledged that he understood when he signed the contract that it made no promises as to specific numbers of birds to be placed, the numbers of flocks per year, or the types of birds, and that it contained no income or expense figures. In fact, Cagle increased the payment it paid per pound during the life of the contracts, and Mims earned near the projected amount during the life of the contracts. Mims states that if he received bad chickens, that constitutes a breach of contract. He has failed to show that he received more than his fair share of weaker birds, and thus has failed to create a genuine issue of fact as to a breach of contract. Mims does not flesh out what is reasonable to expect, which provisions of the contract were violated, and which flocks violated the contracts. Therefore, the district cou t properly granted summary judgment.

III. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment is **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

MARK a. GLASS and MARK A. GLASS ENTERPRISES, INC., Plaintiffs,	:	
vs.	:	1:01-CV-118-2 (WLS)
CAGLE'S INC., CAGLE'S FARMS, INC. and CAGLE FOODS JV, LLC, Defendants.	:	

ORDER

(Filed Sep. 29, 2004)

Presently pending before the Court is Defendants Cagle Foods JV, LLC's, ("Cable JV") motion for summary judgment. (Tab 69). Also, pending is Defendant's motion to strike Plaintiff's expert. (Tab 75). For the following reasons, Defendant's motion for summary judgment (Tab 69) is **GRANTED** and Defendant's motion to strike (Tab 75) is **DENIED as moot**.

DISCUSSION

FACTUAL BACKGROUND

Cagle Foods JV's Operations

Cagle Foods JV ("Cagle JV") operates an integrated poultry processing complex based in Camilla, Georgia, where it produces chicken meat for McDonald's Restaurants. Cagle JV's operation is composed of a slaughtering plant, a processing facility, a feed mill, a hatchery and

numerous contract farming facilities. The complex produces a significant portion of McDonald's daily chicken requirements.

An integrated chicken processing operation is a complex and inclusive endeavor. Cagle JV purchases baby hens (pullets), to lay eggs only, and roosters from outside breeders. These breeders are independent companies that conduct genetic testing and develop different breeds of chickens with different characteristics. The main characteristic that companies such as Cagle JV are interested in is breeds which yield a large amount of meat.

After purchasing the chicks, Cagle JV places the birds with contract "pullet growers" who care for and raise the birds from approximately 2 days old until approximately 20 weeks old. Cagle JV provides the feed, medication and other support to the growers. The pullet growers provide the chicken houses and the labor. The hens will only be used to lay eggs which will be hatched, raised and slaughtered.

At approximately 20 weeks old, Cagle JV transports the chickens from the pullet growers to farms owned by contract "breeder growers." At the breeder farms, the chickens lay eggs which are collected by the growers and delivered to the hatchery owned by Cagle JV. The birds remain on the breeder farm until they are approximately 65 weeks old, when the birds are then collected and sold to outside companies for slaughter. Cagle JV retains ownership of the birds and the eggs and Cagle JV provides feed, medication and support services to the breeder growers. The breeder growers are paid per dozen eggs produced along with performance bonuses.

The chicks from the hatchery are then taken to "broiler growers" who raise the birds for eventual slaughter and processing at Cagle JV's processing plant. The Plaintiffs are broiler growers. Cagle JV processes approximately 250,000 chickens a day. As with the other growers, Cagle JV maintains ownership of the chickens and provides the broiler growers with feed, medication and support services. The broiler growers provide the chicken houses and labor. The broiler growers are paid based on the weight of chickens upon delivery to the processing facility. The main goal of Cagle JV's contract grower operation is to produce birds with the maximum meat possible. Any problems in the supply chain, such as poor egg production, disease, or high mortality rate at the growers' farms significantly impacts Cagle JV's ability to provide chicken to its customers.

History of the Cagle Food JV Camilla Complex

Cagle's, Inc. ("Cagle's") operated an intergrated poultry processing complex in northern Florida prior to 1993. Part of its operation included a small processing plant in Camilla, Georgia. Around 1993, Cagle's began to plan to move its operations from northern Florida to southern Georgia.

In March, 1993, Cagle's entered into a joint venture with Keystone Foods, LLC ("Keystone") to produce chicken meat. The joint venture created an independent company, Cagle JV, to operate the joint venture. Cagle JV expanded the Camilla facility to include starting the integrated production of chicken meat in south Georgia. As part of the expansion of the Camilla facility, Cagle JV began recruiting the various growers needed for the integrated production of

chicken meat. Danny Eiland, the Live Operations Manager for Cagle JV, was initially in charge of recruiting the various growers. Cagle JV began operating the new facility in April of 1995.

Glass's' Entry Into the Chicken Business

Glass, having earned a B.S. Degree in management from Georgia Tech, first became aware of the possibility of entering the chicken growing business in 1990 or 1991 while he was working as a consultant for Anderson Consulting, when his father-in-law, James Lee Adams, raised the possibility. Adams explained that he wanted his daughter closer to home in Southwest Georgia. Glass and Adams discussed the construction of chicken houses as well as the financial aspects of a broiler operation.

Glass and Adams met with Danny Eiland, Broiler Manager for the Camilla operation in late 1990 or 1991. At this meeting, Eiland discussed that the Camilla operation was about to expand and discussed general details about the company's desire to expand the number of broiler houses. Eiland did not give Glass or Adams any documents or cost projections at this meeting.

During this meeting which lasted about 30 minutes, Eiland explained that as the Camilla operation expanded the Company's marketing would change. As a result the number of birds in a flock and the size of the birds growers were to grow would also change. Glass understood that things could change as the company expanded and developed its marketing strategies. During the next several months, Glass had numerous discussions and meetings with Eiland. Also, Adams had discussions with Glass and Eiland. Glass and Eiland had a second meeting, during

which they talked more specifically about the details of boiler operations and visited "lots" of chicken farms. Glass visited approximately 10 or more broiler, breeder, and pullet farms and spoke to the farmers.

Based on those discussions, and along with information from his bank concerning financing for a four house farm, Glass projected a net income of $24,650. Glass based his estimates on 25,000 birds per house, with an average weight of 5.5 pounds, and a payment per pound of 3.5¢. Glass also assumed 5 flocks a year. Glass' net income was based on the assumption that the construction costs would be financed over a 15 year term at 7% and did not include any hired labor to work the houses. Glass claims that he received some or all of these figures from Eiland, but he has not received any written cost estimates during discovery. Glass also discussed the income potential of being a broiler grower with several other farms as well as bankers at Planters & Citizens Bank ("P&C").

Sometime during 1991, Eiland told Glass that Eiland would put him on the list to be a grower for the Defendant. As a result, Eiland provided Glass with a list of approved contractors as well as construction specifications. In addition, Glass continued his research into the poultry business, researching such things as contractors, construction methods and financing. Glass also contacted the Georgia Agriculture Extension Service and spoke with Stan Savage. Savage confirmed that Defendant's projections were reasonable and accurate. During this period, the exact date is unclear, Glass created another broiler farm income projection. Glass assumed a financing term of only 10 years, an interest rate of 8%, 25,000 birds per house, an average weight per bird of 5.87 pounds and a

base pay of 4.2¢ per pound. That projection also assumed no outside labor to work the houses.

In late 1993, Eiland informed Glass that it was time to decide whether to get into the business. Glass decided to get in the business and purchased property from his father-in-law, James Adams, on which to build the houses. Glass financed the construction of the first houses through P&C Bank, with a loan of $460,000, financed for a ten year term at 7.75%. Cagle JV provided Glass with a letter of intent which stated:

> No other representations or understandings, except as specifically provided herein shall be of any force and effect unless in a writing signed by an authorized representative of Cables Foods JV, LLC.

Construction began in early 1994 and took six to eight months to complete. Five broiler houses were constructed, even though that was not Glass's initial plan. The construction cost were consistent with the cost estimates provided by Eiland. Some specifications for the houses had changed but those changes did not significantly change the cost. After completion, the first flock was placed during the summer of 1994.

On March 14, 1994, Glass signed his first broiler production contract. Under the agreement Cagle JV was responsible for placing the appropriate sized flock, to deliver feed in a timely manner and to furnish the appropriate medical supplies. The contract also contained the following disclaimer:

> K. This Agreement contains the entire agreement between the parties and includes all promises and representations, express or implied,

> made by the Company and the Producer and by either of them. Any prior oral or written representations not expressly set forth in this Agreement are hereby cancelled and are no longer of any force or effect. This Agreement may not be altered in any manner except by a written instrument signed by both parties.

Glass read and understood the merger clause. Although the estimates provided a pay rate of 3.95¢ per pound, Cagle JV agreed to pay Glass 4.2¢ per pound. Near the end of his first flock, Cagle JV raised the rate of pay to 4.3¢ per pound.

Even though Glass claims he experienced problems with bird health from the beginning, he decided to expand his operation on three separate occasions during the next several years. Currently Glass owns two separate farms consisting of eight broiler houses and manages his father-in-law's farm which consists of six broiler houses. Glass testified that even during his expansions, Eiland's figures continued to be reasonably accurate. Even so, Glass hired outside labor to work his houses. Glass admitted, even though Eiland's projections and his own did not call for it, he knew that hired labor skewed his bottom line.

Larger Birds and Smaller Flocks

Beginning in 1997, in order to satisfy the requirements of McDonald's, Cagle JV's main customer, Cagle JV began placing a larger bird with the growers. The bird would grow to 6 pounds or greater. For a number of reasons, such as health of the birds, Cagle JV decreased the bird placement from approximately 25,000 birds per house to approximately 23,000 birds per house. Glass did not complain when the flock sizes were reduced. The

increase in average size made up for the loss in the number of birds. In fact, from 1996 to 2000, the average weight of the birds grown on the Glass's farms was 6.53 pounds. In addition, the amount paid per pound per bird increased from 1994 to 2000 from 4.2¢ to 4.5¢ per pound.

Glass' Performance as a Grower

The Cagle JV cost and return estimate provided an estimated gross income of a certain amount. Glass generated revenues in excess of $370,00 over the estimates. Even though the Cagle JV estimate did not provide for the cost of labor, Glass hired workers in 1995.

Glass was rated by his flock supervisor as "an average to below average grower" because given the number of houses for which he was responsible, Glass was not able to devote the appropriate time to each flock. Service reports filed when flock supervisors visited the farms noted numerous problems. Problems included such things as vent problems, fan problems, migration fence problems and dirty houses. All these problems affected Glass' bird's performance.

Glass' flock performance fluctuated throughout his entire tenure as a grower. From 1998 through 2002, Glass' performance as compared to other growers was below average. He claims that his performance was a result of retaliation for his involvement in the United Poultry Growers Association. ("UPGA"). Even before his involvement in UPGA his flock performances were average to below average.

In mid-to-late 1999, on Glass' farms and the farm he managed, the broilers developed a leg infection. Cagle JV

sent numerous veterinarians and other consultants to work with Glass on the problem. Cagle JV eventually placed a test flock in one of the houses. Cagle JV managed the flock which did better than the Glass managed flocks. Cagle JV was never able to determine the cause of the disease.

Chick Quality and Feed Accounting

Glass alleges that he has been plagued with sick birds from the beginning of his contracts with Cagle JV. These problems allegedly existed before Glass became actively involved in the grower association. Even though Glass claims he made verbal complaints about the quality of the chicks, he never made a written complaint or commented on the chick delivery reports. Even with these problems, Glass continued to expand his farming operation and induced his father-in-law to build chicken houses. In addition, Glass now admits that the bird quality problems he experienced were no different than what other growers experienced. Also, as with all the other Cagle JV growers, Glass had birds that had the REO virus, which is the bird equivalent of AIDS. When thousand of birds died because of the disease, Glass received additional compensation from Cagle JV.

Glass also claims that he experienced feed problems. However, he cannot point to any particular instance that he was shorted feed or suffered other feed problems. In addition, he never documented any such problems. Likewise, Glass claims he experienced feed accounting problems, but as with his other problems he cannot point to any specific instances where he was shorted feed or overcharged.

Cagle JV Presents Growers With New Contract

In May of 1999, in an effort to combat rising legal cost, Cagle JV presented the growers with a new contract containing an arbitration clause and a higher payment. Cagle JV told the growers that if they did not except the contract they could still be growers. Glass rejected the new contract, but continued to be a Cagle JV grower. In the spring of 2002, Cagle JV presented Glass with a new contract, with a higher payment per pound of chicken produced and an optional arbitration clause. Apparently, Glass accepted this contract.

Glass' Involvement In The UPGA

Glass joined the UPGA in late 1997 or early 1998 and has been its treasurer since 1998. Even prior to joining the UPGA Glass was involved in the Mitchell County Farm Bureau. Glass saw Cagle JV employees at these meeting because the employees were invited to the meetings. No one from Cagle JV ever asked him about his involvement in grower associations or told him to end his affiliation with the organizations.

In December of 1998, Glass and Adams spoke at an open meeting of the Georgia House of Representative Agricultural Committee in Tifton and Atlanta. The meetings were related to the poultry industry. Glass and Adams were highly critical of Cagle JV. After those meetings, Doug Cagle met with Glass and Adams. In Late December 1998 or January 1999, Glass and Adams met with Cagle, Donnie Peters, Gene Mullins, and Gene Misner, all Cagle employees. Cagle listened to the complaints of Glass and Adams. Cagle then commented on the performance of Glass' and Adams' farms, and explained that chick

placement was random. Cagle then commented on Glass' and Adams' comments to the Agricultural Commitee. Cagle stated that he would never retaliate against anyone who sued him and that he did not appreciate the two trashing his reputation. Cagle stated that if Glass and Adams continued to trash his reputation they would have problems with him. Adams explained that the remarks were not personal but were related to legitimate business concerns about the way things were working in the Camilla operation. Mullins explained that he wanted the growers to be happy and make money and that he would do everything to make sure that happened. When the meeting broke up, the parties exchanged pleasantries and thanked each other for having the meeting. Glass and Adams left the meeting thinking that they were on friendly terms with Cagle.

Plaintiffs' Complaint

On June 22, 2001, Glass filed a seven count complaint against Cagle JV. In Count One, Plaintiff complains that Cagle JV violated the Packers and Stockyards Act ("PSA"), 7 U.S.C. §§ 181-231, by intentionally misweighing Plaintiff's broilers. Count Two alleges that Cagle JV committed fraud. In Court Three, Plaintiff alleges that Cagle JV violated the Georgia RICO statute. Court Four alleges fraud in the inducement/promissory estoppel. In Court Five, Plaintiff alleges breach of contract. Count Six alleges violation of the Agricultural Fair Practice Act (AFPA), 7 U.S.C. §§ 2301-2306. Lastly, Court Seven seeks declaratory relief that the arbitration contracts are/were unenforceable. Cagle JV seeks summary judgment on all claims.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Court is required to "resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his or her favor." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (quotations and citations omitted).

The moving party carries the initial burden of showing that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The substantive law governing the case determines which facts are material, and "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). For issues on which the non-movant bears the burden of proof at trial, the moving party "simply may show – that is, point out to the district court ___ that there is an absence of evidence to support the non-moving party's case. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case." *Fitzpatrick*, 2 F.3d at 1116 (quotations and citations omitted).

If the moving party fails to overcome this initial burden, the Court must deny the motion for summary

judgment without considering any evidence, if any, presented by the non-moving party. *Fitzpatrick*, 2 F.3d at 1116. If, on the other hand, the moving party overcomes this initial burden, then the non-moving party must show the existence of a genuine issue of material fact that remains to be resolved at trial. *Id.* Moreover, the adverse party may not respond to the motion for summary judgment by summarily denying the allegations set forth by the moving party. Rather, the adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

Count I, Violation of the PSA

The PSA prohibits "unfair, unjustly discriminatory, or deceptive practices or devices," or "any undue or unreasonable preference or advantage." 7 U.S.C. §§ 192(a) and (b). In support of their PSA claims, Glass essentially argues that Cagle JV provided him with inferior birds, inferior feed, improperly weighed birds and by offering them the arbitration contract.

Glass has produced no evidence that he received a substantial number of bad birds, much less that Cagle JV intentionally provided him with bad birds. Since early 1990's, Glass has received numerous deliveries of birds. Glass never noted those alleged deficiencies on the Chick Delivery Reports or kept any records documenting such deficiencies. Cagle JV produced clear and unrefuted evidence that it is virtually impossible for Cagle JV to target specific farms for delivery of inferior birds.

As to his claims of receiving insufficient or inferior feed, Glass cannot identify any instance where he was charged for feed that he did not receive. Glass admits that he consistently checked his feed inventory to verify that the correct amount of feed was delivered to his farms.

Their improper weighing claim is a little more problematic. Glass, however, points to the deposition of Bennie Morris, a security guard at the old plant and the new plant from 1987 through 1997, who was in charge of weighing the trucks. According to his testimony, there was a wide spread practice, which according to his testimony did not appear fraudulent, of weighing the trucks with different tractors and other discrepancies that could effect the live weight. According to Glass' interpretation of Morris' testimony, the practice was not only wide spread but continuous and fraudulent. However, a close reading of the deposition does not support this interpretation.

First, Morris clearly states that the weighing discrepancies virtually ended when Kermit Logan became controller in August, 1987. At that time, Logan and Morris ensured that the security guards were certified by GIPSA. From that point, Morris began strictly enforcing the proper weighing procedures and that numerous drivers were disciplined for not following procedures. He stated that he did not believe the company had a policy of intentionally misweighing the poultry to deprive the growers their pay. In fact, Morris was under the impression that a plant and its employees in another state were held criminally liable for intentionally misweighing poultry. Morris also stated that untimely weighing of birds also stopped at about the same time. While it is possible to interpret some of Morris' answers that some misweighing occurred occasionally thereafter, a reasonable reading of his answers

attributes these problems to sporadic failures of drivers to follow the rules or problems causing the plant to shut down temporarily.

Glass argues that the "arbitration contracts" violate the PSA. While those accepting the arbitration contracts were paid at a higher rate for a period of time, the contracts were offered equally to all growers. In fact, the contract complained of is not in use today and all growers are paid the same amount whether or not they accepted the arbitration contract. It cannot be said that the arbitration contracts were/are unfair as applied to Glass. *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995). As there is no genuine issue of material fact on Plaintiff's PSA claim, Cagle JV is entitled to summary judgment. Therefore, Cagle JV's motion for summary judgment on the PSA claim (Tab 69) is **GRANTED**.[1]

Count II, Fraud

In order to prevail, under Georgia law, for common law fraud, the plaintiff must prove the following:

> (1) [A] false representation made by the defendants; (2) scienter, or knowledge of the statement's falsity at the time the statement was made; (3) an intention to induce the plaintiff to act or refrain from acting in reliance on the statement; (4) the plaintiff's justifiable reliance; and (5) damage to the plaintiff.

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[1] As the Court determines that the arbitration contracts did not violate the PSA, the Court **GRANTS** Cagle JV's motion for summary judgment on Plaintiff's request for declaratory judgment that the contracts are/were unenforceable (Count VII). (Tab 69).

Pro-Fab, Inc. v. Vipa, Inc., 772 F.2d 847, 851 (11th Cir. 1985). Acts which constitute negligence do not give rise to a cause of action for fraud. *Mills v. Damson Oil Corp.*, 931 F.2d 346, 348 (5th Cir. 1991).

Glass alleges that Cagle JV committed the intentional and false acts of (1) recording false trailer weights; (2) recording false tare and gross weights; (3) failure to promptly weigh Plaintiffs birds; (4) failing to weigh feed properly and provided inferior feed; and (4) providing inferior birds. As noted previously, Plaintiff has failed to provide any admissible evidence that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's motion for summary judgment on the fraud claim (Tab 69) is **GRANTED**.

Count III, Georgia RICO Claim

Defendant argues that it is entitled to summary judgment on Plaintiffs' RICO claim made pursuant to Georgia law. Cagle JV argues that Plaintiff has failed to demonstrate two or more predicate acts which are related and have continuity. *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991). Plaintiff's reliance either on mail fraud or theft by deception does not matter. To prove a violation of the federal mail fraud statute, Plaintiff must show that Cagle JV: "(1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme." *Pelletier*, 921 F.2d at 1498. To prove theft by deception, Plaintiffs must show that Cagle JV had criminal intent and knowledge, not just misrepresentation. *Avery v. Chrysler Motors*

Corp., 214 Ga. App. 602 (1994). Plaintiff, in order to show a scheme to defraud, must show "some type of deceptive conduct occurred." *Pelletier*, 921 F.2d at 1500.

Plaintiff relies on the same allegations to support his RICO claim that he contends support his fraud claim. As with the fraud claim, Glass has not produced any admissible evidence to support those claims. In addition, Plaintiff alleges that Cagle JV caused fraudulent final statements to be mailed. As with the previous fraud claims, Glass cannot point to a single statement shown to be fraudulent. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's motion for summary judgment on Plaintiff's RICO claim (Tab 69) is **GRANTED.**

Count IV. Fraudulent Inducement/Promissory Estoppel

It is well settled that "fraud cannot be predicated upon statements which are promissory in their nature as to future acts." *Warner v. Jeter*, 115 Ga. App. 6, 7 (1967). "Fraud cannot consist of mere broken promises, unfulfilled predictions or erroneous conjectures as to future events." *C.P.D. Chemical Company, Inc. V. National Car Rental Systems, Inc.*, 148 Ga. App. 756, 759 (1979). Further, "representations concerning expectations and hopes are not actionable." *Smith v. McClung*, 215 Ga. App. 786, 788 (1994).

Courts interpreting Georgia law, in cases where the plaintiff alleges fraud because the defendant promised the plaintiff that a business could be expected to generate a certain income or a certain endeavor would be profitable, have consistently held that such facts do not constitute fraud absent something more. The Georgia Court of Appeals stated as early as 1952 that:

> Insofar as the defendant relies, in support of his plea of fraud, upon representations of the seller to the effect that the business was expanding in value and would continue to make gross sales in the future of $24,000 or larger mounts, whereas as a matter of fact the business grossed only $15,000 during the twelve-month period in which it was operated by the defendant – these statements are insufficient to constitute actionable fraud. Generally, warranties relate to future events, and representations to past or existing facts, and mere unfulfilled predictions and erroneous conjectures as to future events do not constitute actionable fraud. *Rogers v. Sinclair Refining Co.*, 49 Ga.App. 72, 174 S.E. 207. Mere 'puffing' does not constitute legal fraud, the same not being calculated to really mislead a purchaser, especially when he is afforded a full opportunity to form his own independent opinion as to the advisability of becoming a purchaser.

Krys v. Henderson, 85 Ga.App. 323, 325 (1952). Likewise, Georgia law requires a purchaser, who is not in a fiduciary relationship, to independently investigate the representations of another. *Krys*, 85 Ga. App. at 324-325.

Despite the allegations in the complaint, Glass essentially admitted during depositions that the written projections were not inaccurate. For example, Glass complains about income projections but admitted he used outside labor, even though, Cagle JV's projections of income were dependent on the grower *not* hiring outside labor. Glass complained that the bigger birds resulted in less flocks per year, but acknowledged that with per pound increases in pay, his income stayed the same or improved. The same is true concerning inferior birds. Plaintiff could not show that Cagle JV intentionally placed sick birds. Also, Glass'

poor farm management contributed to his poor performance. Since Cagle JV operates an integrated chicken processing operation, Plaintiff has been unable to find a motivation for Cagle Foods to cause problems with its supply chain by intentionally placing broilers with growers that are diseased or inferior to reduce Plaintiff's production of chickens. Such a scheme would ultimately impact Cagle JV more than the various Plaintiffs. Plaintiff did not blindly rely on Cagle JV's projections but independently researched the projections and found them to be reasonable.

The evidence is overwhelming that the cost and return estimates and broiler productivity projections were well based and mostly accurate. It is undisputed that the broiler production projections were based on figures provided by the primary breeders. The cost and return estimates were consistent with industry standards, and closely tracked the Plaintiff's actual returns, if one accounts for the use of outside labor and pour farm management.

The Court finds that Plaintiff has failed to put forth sufficient evidence to establish a *prima facie* case of fraud. Cagle JV is entitled to summary judgment on the Plaintiff's fraudulent inducement count as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs fraudulent inducement claim (Tab 69) is **GRANTED**.

Promissory Estoppel

In order to prevail on a claim of promissory estoppel, the plaintiff must show that (1) defendant made certain

promises; (2) defendant should have expected that the plaintiff would rely on such promises; and (3) plaintiff did in fact rely on such promises to their detriment. *Doll v. Grand Union Company,* 925 F.2d 1363 (11th Cir. 1991). Plaintiff, however, has sought to enforce the underlying contracts and does not dispute the validity of the contracts. When a plaintiff seeks to enforce the underlying contract, especially a promise reduced to writing, promissory estoppel is not available as a remedy. *Bank of Dade v. Reeves,* 257 Ga. 51, 53 (1987).

In addition, promissory estoppel "applies to representations of past or present facts and not to promises concerning the future, especially where those promises concern unenforceable vague future acts." *Voyles v. Sasser,* 221 Ga. App. 305, 305-306 (1996). Moreover, "there must be reasonable reliance" on the alleged promise. *Simpson Consulting, Inc. v. Barclays Bank PLC,* 227 Ga. App. 648, 657 (1997). Plaintiff, however, refers only to representations of projected future performance of his farms.

Plaintiff has failed to establish a *prima facie* claim for promissory estoppel. Therefore, Cagle JV is entitled to summary judgment on the Plaintiff's promissory estoppel count as there is no genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiff's promissory estoppel claim (Tab 69) is **GRANTED**.

Count V, The Agricultural Fair Practices Act

Plaintiff also alleges that Cagle JV violated the Agricultural Fair Practices Act when its agents and employees interfered with Plaintiff's attempt to organize

and participate in a grower or poultry association and discriminated against them for such participation. Cagle JV essentially concedes that if its agents had discriminated against Plaintiff for organizing or participating in a poultry association, it would have violated the Act.

Even though the allegations are made, Glass testified in his depositions that he was not harassed by Cagle JV or its agents for participating in the association. Even though Glass claims retaliation, he has not produced any evidence that Cagle JV systematically provided him with inferior birds or feed, or forced him to accept the arbitration contract. Cagle JV is entitled to summary judgment on the Plaintiffs' Agricultural Fair Practices Act claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiff's claim for violation of the AFPA (Tab 69) is **GRANTED.**

Count Six, Breach of Contract

Based on all of the evidence discussed so far, it is clear that Cagle JV did not breach the grower contracts that existed between Glass and Defendant. In fact, Cagle JV increased the payment it paid per pound for broilers produced during the life of the contracts. Plaintiff earned near the projected amount, or more, during the life of the contracts. When production numbers were off, the available evidence shows that it was because of Glass' use of paid labor and inability to properly manage his farms. Cagle JV is entitled to summary judgment on the Plaintiff's breach of contract claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's

motion for summary judgment on Plaintiff's claim for breach of contract (Tab 69) is **GRANTED**.

Defendant's Motion to Strike Plaintiff's Expert's Testimony

Defendant argues that this Court should strike the testimony of Plaintiff's expert, Dr. C. Robert Taylor, (Tab 75). As the Court has considered the testimony and the other evidence before the Court and granted Defendant's motion for summary judgment on all claims, Defendant's motion to strike Plaintiff's expert's testimony (Tab 75) is **DENIED as moot.**

CONCLUSION

Cagle JV's motion for summary judgment on all of Plaintiffs claims (Tab 69) is **GRANTED**. Defendant's motion to strike Plaintiff's expert's testimony (Tab 75) is **DENIED as moot.**

SO ORDERED, this 28th day of September, 2004.

/s/ W. Louis Sands
W. LOUIS SANDS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

RICHARD WHEELER, III,	:	
Plaintiff,	:	
vs.	:	1:01-CV-160(WLS)
CAGLE'S INC., CAGLE'S FARMS, INC. and CAGLE FOODS JV, LLC,	:	
Defendants.	:	

ORDER

(Filed Sep. 29, 2004)

Presently pending before the Court is Defendant Cagle Foods JV, LLC's, ("Cagle JV") motion for summary judgment. (Tab 197). Also, pending is Defendant's motion to strike Plaintiff's expert. (Tab 206). For the following reasons, Defendant's motion for summary judgment (Tab 197) is **GRANTED** and Defendant's motion to strike (Tab 206) is **DENIED as moot**.

DISCUSSION

FACTUAL BACKGROUND

Cagle Foods JV's Operations

Cagle Foods JV ("Cagle JV") operates an integrated poultry processing complex based in Camilla, Georgia, where it produces chicken meat for McDonald's Restaurants. Cagle JV's operation is comprised of a slaughtering plant, a processing facility, a feed mill, a hatchery and

numerous co. tract farming facilities. The complex produces a significant portion of McDonald's daily chicken requirements.

An integrated chicken processing operation is a complex and inclusive endeavor. Cagle JV purchases baby hens (pullets), to lay eggs only, and roosters from outside breeders. These breeders are independent companies that conduct genetic testing and develop different breeds of chickens with different characteristics. The main characteristic that companies such as Cagle JV are interested in is breeds which yield a large amount of meat.

After purchasing the chicks, Cagle JV places the birds with contract "pullet growers" who care for and raise the birds from approximately 2 days old until approximately 20 weeks old. Cagle JV provides the feed, medication and other support to the growers. The pullet growers provide the chicken houses and the labor. The hens will only be used to lay eggs which will be hatched, raised and slaughtered.

At approximately 20 weeks old, Cagle JV transports the chickens from the pullet growers to farms owned by contract "breeder growers." At the breeder farms, the chickens lay eggs which are collected by the growers and delivered to the hatchery owned by Cagle JV. The birds remain on the breeder farm until they are approximately 65 weeks old, when the birds are then collected and sold to outside companies for slaughter. Cagle JV retains ownership of the birds and the eggs and Cagle JV provides feed, medication and support services to the breeder growers. The breeder growers are paid per dozen eggs produced along with performance bonuses.

The chicks from the hatchery are then taken to "broiler growers" who raise the birds for eventual slaughter and processing at Cagle JV's processing plant. The Plaintiffs are broiler growers. Cagle JV processes approximately 250,000 chickens a day. As with the other growers, Cagle JV maintains ownership of the chickens and provides the broiler growers with feed, medication and support services. The broiler growers provide the chicken houses and labor. The broiler growers are paid based on the weight of chickens upon delivery to the processing facility. The main goal of Cagle JV's contract grower operation is to produce birds with the maximum meat possible. Any problems in the supply chain, such as poor egg production, disease, or high mortality rate at the growers' farms significantly impacts Cagle JV's ability to provide chicken to its customers.

History of the Cagle Food JV Camilla Complex

Cagle's, Inc. ("Cagle's") operated an integrated poultry processing complex in northern Florida prior to 1993. Part of its operation included a small processing plant in Camilla, Georgia. Around 1993, Cagle's began to plan to move its operations from northern Florida to southern Georgia.

In March, 1993, Cagle's entered into a joint venture with Keystone Foods, LLC ("Keystone") to produce chicken meat. The joint venture created an independent company, Cagle JV, to operate the joint venture. Cagle JV expanded the Camilla facility to include starting the integrated production of chicken meat in south Georgia. As part of the expansion of the Camilla facility, Cagle JV began recruiting the various growers needed for the integrated production of chicken meat. Denny Eiland, the Live Operations

Manager for Cagle JV, was initially in charge of recruiting the various growers. Cagle JV began operating the new facility in April of 1995.

Wheeler's' Entry Into the Chicken Business

In 1997, while Wheeler was engaged in crop consulting, he became interested in the chicken business through a friend, Gary Thomas, who grew broilers for Cagle JV. Wheeler looked at the business as a fall back business where if he could not work be would have an income. Wheeler visited Thomas frequently and worked in Thomas' chicken houses. Wheeler recalled that Thomas had a good experience in the business and was satisfied. Wheeler also discussed the poultry business with Travis Mims and other Cagle growers. Plaintiff also talked to Joe McCarty who related his bad experiences as a broiler grower. Wheeler reviewed McCarty's books and saw that McCarty was losing money as a broiler grower.

At some point Wheeler was given a document which contained information about cost and profit expectations for broiler growers by one of the growers with whom he had become acquainted. The estimates apparently were based on projections provided by Cagle JV. The document provided income projections, bird size, approximate flock size, financing information, other cost estimations, and other information. Also, the document contained a disclaimer that the document was only illustrative and was not an actual projection of actual performance.

In mid-1994, while discussing broiler production with McCarty and others, Wheeler met with Danny Eiland, Broiler Manager for the Camilla operation. At this meeting, Eiland discussed that the Camilla operation was

expanding and the broiler production business. Eiland did not give Wheeler any documents or cost projections at this meeting. During this meeting, Eiland explained that as the Camilla operation expanded the Company's marketing would change. As a result the number of birds in a flock and the size of the birds growers were to grow would also change. Wheeler understood that things could change as the company expanded and developed its marketing strategies. During the next several months, Wheeler had at least two more meetings with Eiland prior to purchasing the McCarty farm.

Wheeler had an independent appraisal done of the McCarty farm and after seeing the appraiser's report thought it was a good deal. Wheeler financed the purchase of the McCarty farm through P&C Bank.

On September 28, 1994, Wheeler signed his first broiler production contract. Under the agreement Cagle JV was responsible for placing the appropriate sized flock, to deliver feed in a timely manner and to furnish the appropriate medical supplies. The contact also contained the following disclaimer.

> K. This Agreement contains the entire agreement between the parties and includes all promises and representations, express or implied, made by the Company and the Producer and by either of them. Any prior oral or written representations not expressly set forth in this Agreement are hereby cancelled and are no longer of any force or effect. This Agreement may not be altered in any manner except by a written instrument signed by both parties.

Wheeler read and understood the merger clause. Since entering his first contract with Cagle, wheeler has signed

two contracts and each has contained (1) a pay raise, (2) identical provisions as to flock placement, (3) the grower's obligation to accept placement, and, (4) the same merger clause.

Larger Birds and Smaller Flocks

Beginning in or about 1997, in order to satisfy the requirements of McDonald's, Cagle JV's main customer, Cagle JV began placing a larger bird with the growers. The bird would grow to 6 pounds or greater. For a number of reasons, such as health of the birds, Cagle JV decreased the bird placement from approximately 25,000 birds per house to approximately 23,000 birds per house. Wheeler did not complain when the flock sizes were reduced. The increase in average size made up for the loss in the number of birds. In fact, from 1997 to 2002, the average weight of the birds grown on the Wheeler's's farms was 6.43 pounds. In addition, the amount paid per pound per bird increased from 1994 to 2000 from 4.2¢ to 4.3¢ per pound.

Wheeler's' Performance as a Grower

The Cagle JV cost and return estimate provided an estimated gross income of a certain amount. Wheeler generated revenues in excess of the estimates. Even though the Cagle JV estimate did not provide for the cost of labor. During the years that his income fell below the estimates, Wheeler hired workers to work his chicken houses.

Weighing Procedures

In May 1996, the Grain Inspection, Packers and Stockyard Administration ("GIPSA") inspectors observed Cagle JV employees weighing trailers containing live chickens with different tractors than trailers that were empty. As a result of that inspection, Cagle JV recalculated payments and weights from April 1, 1995, the day the Camilla plant opened, and reimbursed growers that were underpaid. Cagle JV did not penalize or charge growers that were overpaid. The audit was disclosed to all growers by letter dated September 25, 1996. GIPSA reviewed and approved of the process Cagle JV utilized. Wheeler was given a payment of $635.13 for possible underpayment and was not charged for overpayment of $457.91. Of the many loads of chickens produced by Wheeler and weighed by Cagle JV, he has not pointed to any specific instances where his chickens were not weighed properly.

Cagle JV Presents Growers With New Contract

In May of 1999, in an effort to combat rising legal cost, Cagle JV presented the growers with a new contract containing an arbitration clause and a higher payment. Cagle JV told the growers that if they did not accept the contract they could still be growers. Wheeler rejected the new contract, but continued to be a Cagle JV grower.

Wheeler's Involvement In The UPGA

Wheeler joined the UPGA in mid-1998. Since joining he has attended between five and ten meetings. Wheeler saw Cagle JV employees at these meetings because the employees were invited to the meetings. Except for when

one service representative mentioning the UPGA, no one from Cagle JV ever asked him about his involvement in grower associations or told him to end his affiliation with the organizations.

Plaintiffs' Complaint

On January 14, 2002, Wheeler filed a seven count amended complaint against Cagle JV. In Count One, Plaintiff complains that Cagle JV violated the Packers and Stockyards Act ("PSA"), 7 U.S.C. §§ 181-231, by intentionally misweighing Plaintiff's broilers. Count Two alleges that Cagle JV committed fraud. In Count Three, Plaintiff alleges that Cagle JV violated the Georgia RICO statute. Court Four alleges fraud in the inducement/promissory estoppel. In Count Five, Plaintiff alleges breach of contract. Count Six alleges violation of the Agricultural Fair Practice Act (AFPA), 7 U.S.C. §§ 2301-2306. Lastly, Count Seven seeks declaratory relief that the arbitration contracts are/were unenforceable. Cagle JV seeks summary judgment on all claims.

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The moving party carries the initial burden of showing that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The substantive law governing the case determines which facts are material, and "summary judgment will not lie if the dispute about a material fact is 'genuine,' that if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 106 S. Ct. 2505, 2510 (1986). For issues on which the non-movant bears the burden of proof at trial, the moving party "simply may show – that is, point out to the district court – that there is an absence of evidence to support the non-moving party's case. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case." *Fitzpatrick*, 2 F.3d at 1116 (quotations and citations omitted).

If the moving party fails to overcome this initial burden, the Court must deny the motion for summary judgment without considering any evidence, if any, presented by the non-moving party. *Fitzpatrick*, 2 F.3d at 1116. If, on the other hand, the moving party overcomes this initial burden, then the non-moving party must show the existence of a genuine issue of material fact that remains to be resolved at trial. *Id.* Moreover, the adverse party may not respond to the motion for summary judgment by summarily denying the allegations set forth by the moving party. Rather, the adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond,

summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

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Wheeler has produced no evidence that he received a substantial number of bad birds, much less that Cagle JV intentionally provided him with bad birds. Since the early 1990's, Wheeler has received numerous deliveries of birds. Wheeler never noted the alleged deficiencies on the Chick Delivery Reports or kept any records documenting such deficiencies. Cagle JV produced clear and unrefined evidence that it is virtually impossible for Cagle JV to target specific farms for delivery of inferior birds.

As to his claims of receiving insufficient or inferior feed, Wheeler cannot identify any instance where he was charged for feed that he did not receive. Wheeler admits that he consistently checked his feed inventory to verify that the correct amount of feed was delivered to his farms. Wheeler even admitted that the feed mill was over worked and subject to mechanical breakdown. Because of his concerns about feed delivery, Wheeler began to secretly record his conversations with Cagle JV's feed mill employees. The ultimate conclusion that can be drawn from the transcripts is that the feed mill employees were dealing with a feed mill that was experiencing mechanical

difficulties and were trying their best to provide growers with feed.

Wheeler's improper weighing claim is a little more problematic. Wheeler, however, points to the deposition of Bennie Morris, a security guard at the old plant and the new plant from 1987 through 1997, who was in charge of weighing the trucks. According to his testimony, there was a wide spread practice, which according to his testimony did not appear fraudulent, of weighing the trucks with different tractors and other discrepancies that could effect the live weight. According to Wheeler's interpretation of Morris' testimony, the practice was not only wide spread but continuous and fraudulent. However, a close reading of the deposition does not support this interpretation.

First, Morris clearly states that the weighing discrepancies virtually ended when Kermit Logan became controller in August, 1987. At that time, Logan and Morris ensured that the security guards were certified by GIPSA. From that point, Morris began strictly enforcing the proper weighing procedures and that numerous drivers were disciplined for not following procedures. He stated that he did not believe the company had a policy of intentionally misweighing the poultry to deprive the growers their pay. In fact, Morris was under the impression that a plant and its employees in another state were held criminally liable for intentionally misweighing poultry. Morris also stated that untimely weighing of birds also stopped at about the same time. While it is possible to interpret some of Morris' answers that some misweighing occurred occasionally thereafter, a reasonable reading of his answers attributes these problems to sporadic failures of drivers to follow the rules or problems causing the plant to shut down temporarily.

Wheeler argues that the "arbitration contracts" violate the PSA. While those accepting the arbitration contracts were paid at a higher rate for a period of time, the contracts were offered equally to all growers. In fact, the contract complained of is not in use today and all growers are paid the same amount whether or not they accepted the arbitration contract. It cannot be said that the arbitration contracts were/are unfair as applied to Wheeler. *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995). As there is no genuine issue of material fact on Plaintiffs' PSA claim, Cagle JV is entitled to summary judgment. Therefore, Cagle JV's motion for summary judgment on the PSA claim (Tab 197) is **GRANTED**.[1]

Count II, Fraud

In order to prevail, under Georgia law, for common law fraud, the plaintiff must prove the following:

> (1) [A] false representation made by the defendants; (2) scienter, or knowledge of the statement's falsity at the time the statement was made; (3) an intention to induce the plaintiff to act or refrain from acting in reliance on the statement; (4) the plaintiff's justifiable reliance; and (5) damage to the plaintiff.

Pro-Fab, Inc. v. Vipa, Inc., 772 F.2d 847, 851 (11th Cir. 1985). Acts which constitute negligence do not give rise to

[1] As the Court determines that the arbitration contracts did not violate the PSA, the Court **GRANTS** Cagle JV's motion for summary judgment on Plaintiff's request for declaratory judgment that the contracts are/were unenforceable (Count VII). (Tab 69).

a cause of action for fraud. *Mills v. Damson Oil Corp.*, 931 F.2d 346, 348 (5th Cir. 1991).

Wheeler alleges that Cagle JV committed the intentional and false acts of (1) recording false trailer weights; (2) recording false tare and gross weights; (3) failure to promptly weigh Plaintiff's birds; (4) failing to weigh feed properly and provided inferior feed; and (4) providing inferior birds. As noted previously, Plaintiff has failed to provide any admissible evidence that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's motion for summary judgment on the fraud claim (Tab 197) is **GRANTED**.

Count III, Georgia RICO Claim

Defendant Cagle JV argues that it is entitled to summary judgment on Plaintiff's RICO claim made pursuant to Georgia law. Cagle JV argues that Plaintiff has failed to demonstrate two or more predicate acts which are related and have continuity. *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991). Plaintiff's reliance either on mail fraud or theft by deception does not matter. To prove a violation of the federal mail fraud statute, Plaintiff must show that Cagle JV: "(1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme." *Pelletier*, 921 F.2d at 1498. To prove theft by deception, plaintiff must show that Cagle JV had criminal intent and knowledge, not just misrepresentation. *Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602 (1994). Plaintiff, in order

to show a scheme to defraud, must show "some type of deceptive conduct occurred," *Pelletier,* 921 F.2d at 1500.

Plaintiff relies on the same allegations to support his RICO claim that he contends support his fraud claim. As with the fraud claim, Wheeler has not produced any admissible evidence to support those claims. In addition, Plaintiff alleges that Cagle JV caused fraudulent final statements to be mailed. As with the previous fraud claims, Wheeler cannot point to a single statement shown to be fraudulent. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's motion for summary judgment on Plaintiff's RICO claim (Tab 197) is **GRANTED**.

Count IV, Fraudulent Inducement/Promissory Estoppel

It is well settled that "fraud cannot be predicated upon statements which are promissory in their nature as to future acts." *Warner v. Jeter,* 115 Ga. App. 6, 7 (1967). "Fraud cannot consist of mere broken promises, unfulfilled predictions or erroneous conjectures as to future events." *C.P.D. Chemical Company, Inc. v. National Car Rental Systems, Inc.,* 143 Ga. App. 756, 759 (1979). Further, "representations concerning expectations and hopes are not actionable," *Smith v. McClung,* 215 Ga. App. 786, 788 (1994).

Courts interpreting Georgia law, in cases where the plaintiff alleges fraud because the defendant promised the plaintiff that a business could be expected to generate a certain income or a certain endeavor would be profitable, have consistently held that such facts do not constitute

fraud absent something more. The Georgia Court of Appeals stated as early as 1952 that:

> Insofar as the defendant relies, in support of his plea of fraud, upon representations of the seller to the effect that the business was expanding in value and would continue to make gross sales in the future of $24,000 or larger amounts, whereas as a matter of fact the business grossed only $15,000 during the twelve-month period in which it was operated by the defendant – these statements are insufficient to constitute actionable fraud. Generally, warranties relate to future events, and representations to past or existing facts, and mere unfulfilled predictions and erroneous conjectures as to future events do not constitute actionable fraud. *Rogers v. Sinclair Refining Co.*, 49 Ga.App. 72, 174 S.E. 207, 'Mere 'puffing' does not constitute legal fraud, the same not being calculated to really mislead a purchaser, especially when he is afforded a full opportunity to form his own independent opinion as to the advisability of becoming a purchaser'.

Krys v. Henderson, 85 Ga.App. 323, 325 (1952), Likewise Georgia law requires a purchaser, who is not in a fiduciary relationship, to independently investigate the representations of another. *Krys*, 85 Ga. App. at 324-325.

Despite the allegations in the complaint, Wheeler essentially admitted during depositions that the written projections were not inaccurate. For example, Wheeler had reviewed McCarty's books and knew that he was not making money. Wheeler complained that the bigger birds resulted in less flocks per year, but acknowledged that with per pound increases in pay, his income stayed the same or improved. The same is true concerning inferior

birds. Plaintiff could not show that Cagle JV intentionally placed [illegible] birds. Since Cagle JV operates an integrated chicken processing operation, Plaintiff has been unable to find a motivation for Cagle Foods to cause problems with its supply chain by intentionally placing broilers with growers that are diseased or inferior to reduce Plaintiff's production of chickens. Such a scheme would ultimately impact Cagle JV. Plaintiff did not blindly rely on Cagle JV's projections but independently researched the projections and found them to be reasonable.

The evidence is overwhelming that the cost and return estimates and broiler productivity projections were well based and mostly accurate. It is undisputed that the broiler production projections were based on figures provided by the primary breeders. The cost and return estimates were consistent with industry standards, and closely tracked the Plaintiff's actual returns, if one accounts for the use of outside labor and poor farm management.

The Court finds that Plaintiff has failed to put forth sufficient evidence to establish a *prima facie* case of fraud. Cagle JV is entitled to summary judgment on the Plaintiff's fraudulent inducement count as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiff's fraudulent inducement claim (Tab 197) is **GRANTED**.

Promissory Estoppel

In order to prevail on a claim of promissory estoppel, the plaintiff must show that (1) defendant made certain promises; (2) defendant should have expected that the

plaintiff would rely on such promises; and (3) plaintiff did in fact rely on such promises to his detriment. *Doll v. Grand Union Company,* 925 F.2d 1363 (11th Cir. 1991). Plaintiff, however, has sought to enforce the underlying contracts and does not dispute the validity of the contracts. When a plaintiff seeks to enforce the underlying contract, especially a promise reduced to writing, promissory estoppel is not available as a remedy. *Bank of Dade v. Reeves,* 257 Ga. 51, 53 (1987).

In addition, promissory estoppel "applies to representations of past or present facts and not to promises concerning the future, especially where those promises concern unenforceable vague future acts." *Voyles v. Sasser,* 221 Ga. App. 305, 305-306 (1996). Moreover, "there must be reasonable reliance" on the alleged promise. *Simpson Consulting, Inc. v. Barclays Bank PLC,* 227 Ga. App. 648, 657 (1997). Plaintiff however, refers only to representations of projected future performance of his farms.

Plaintiff has failed to establish a *prima facie* claim for promissory estoppel. Therefore, Cagle JV is entitled to summary judgment on the Plaintiff's promissory estoppel count as there is no genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs' promissory estoppel claim (Tab 197) is **GRANTED**.

Count V. The Agricultural Fair Practices Act

Plaintiff also alleges that Cagle JV violated the Agricultural Fair Practices Act when its agents and employees interfered with Plaintiff's attempt to organize and participate in a grower or poultry association and

discriminated against him for such participation. Cagle JV essentially concedes that if its agents had discriminated against Plaintiff for organizing or participating in a Poultry association, it would have violated the Act.

Even though the allegations are made, Wheeler testified in his depositions that he was not harassed by Cagle JV or its agents for participating in the association. Even though the Wheeler claims retaliation, he has not produced any evidence that Cagle JV systematically provided him with inferior birds or feed, or forced him to accept the arbitration contract. Cagle JV is entitled to summary judgment on the Plaintiff's Agricultural Fair Practices Act claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiff's claim for violation of the AFPA (Tab 69) is **GRANTED**.

Count Six. Breach of Contract

Based on all of the evidence discussed so far, it is clear that Cagle JV did not breach the grower contracts that existed between Wheeler and Defendant. In fact, Cagle JV increased the payment it paid per pound for broilers produced during the life of the contracts. Plaintiff earned near the projected amount, or more, during the life of the contracts. Cagle JV is entitled. to summary judgment on the Plaintiff's breach of contract claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiff's claim for breach of contract (Tab 197) is **GRANTED**.

Defendant's Motion to Strike Plaintiff's Expert's Testimony

Defendant argues that this Court should strike the testimony of Plaintiff's expert, Dr. C. Robert Taylor. (Tab 206). As the Court has considered the testimony and the other evidence before the Court and granted Defendant's motion for summary judgment on all claims, Defendant's motion to strike Plaintiff's expert's testimony (Tab 206) is **DENIED as moot**.

CONCLUSION

Cagle JV's motion for summary judgment on all of Plaintiff's claims (Tab 197) is **GRANTED**. Defendant's motion to strike Plaintiff's expert's testimony (Tab 206) is **DENIED as moot**.

SO ORDERED, this 28th day of September, 2004.

/s/ W. Louis Sands
W. LOUIS SANDS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS AND JILL ADKINS, Plaintiffs,	:	
vs.	:	1: 01-CV-126-2 (WLS)
CAGLE'S INC., CAGLE'S FARMS, INC. and CAGLE FOODS JV, LLC, Defendants.	:	

ORDER

(Filed March 24, 2004)

Presently pending before the Court is Defendants Cagle Foods JV, LLC's, ("Cagle JV") motion for summary judgment. (Tab 71). For the following reasons, Defendant's motion for summary judgment (Tab 71) is **GRANTED**.

DISCUSSION

FACTUAL BACKGROUND

Cagle Foods JV's Operations

Cagle Foods JV ("Cagle JV") operates an integrated poultry processing complex based in Camilla, Georgia, where it produces chicken meat for McDonald's Restaurants. Cagle JVs' operation is comprised of a slaughtering plant, a processing facility, a feed mill, a hatchery and numerous contract farming facilities. The complex produces a significant portion of McDonald's daily chicken requirements.

An integrated chicken processing operation is a complex and inclusive endeavor. Cagle JV purchases baby hens (pullets), to lay eggs only, and roosters from outside breeders. These breeders are independent companies that conduct genetic testing and develop different breeds of chickens with different characteristics. The main characteristic that companies such as Cagle JV are interested in is breeds which yield a large amount of meat.

After purchasing the chicks, Cagle JV places the birds with contract "pullet growers" who care for and raise the birds from approximately 2 days old until approximately 20 weeks old. Cagle JV provides the feed, medication and other support to the growers. The pullet growers provide the chicken houses and the labor. The hens will only be used to lay eggs which will be hatched, raised and slaughtered.

At approximately 20 weeks old, Cagle JV transports the chickens from the pullet growers to farms owned by contract "breeder growers." At the breeder farms, the chickens lay eggs which are collected by the growers and delivered to the hatchery owned by Cagle JV. The birds remain on the breeder farm until they are approximately 65 weeks old, when the birds are then collected and sold to outside companies for slaughter. Cagle JV retains ownership of the birds and the eggs and Cagle JV provides feed, medication and support services to the breeder growers. The breeder growers are paid per dozen eggs produced along with performance bonuses.

The chicks from the hatchery are then taken to "broiler growers" who raise the birds for eventual slaughter and processing at Cagle JV's processing plant. The

Plaintiffs are broiler growers. Cagle JV processes approximately 250,000 chickens a day. As with the other growers, Cagle JV maintains ownership of the chickens and provides the broiler growers with feed, medication and support services. The broiler growers provide the chicken houses and labor. The broiler growers are paid based on the weight of chickens upon delivery to the processing facility. The main goal of Cagle JV's contract grower operation is to produce birds with the maximum meat possible. Any problems in this supply chain, such as poor egg production, disease, or high mortality rate at the growers' farms significantly impacts Cagle JV's ability to provide chicken to its customers.

History of the Cagle Food JV Camilla Complex

Cagle's, Inc. ("Cagle's") operated an intergrated poultry processing complex in northern Florida prior to 1993. Part of its operation included a small processing plant in Camilla, Georgia. Around 1993, Cagles began to plan to move its operations from northern Florida to southern Georgia.

In March, 1993, Cagles entered into a joint venture with Keystone Foods, LLC ("Keystone") to produce chicken meat, The joint venture created an independent company, Cagle JV, to operate the joint venture. Cagle JV expanded the Camilla facility to include starting, the integrated production of chicken meat in south Georgia. As part of the expansion of the Camilla facility, Cagle JV began recruiting the various growers needed for the integrated production of chicken meat. Danny Eiland, the Live Operations Manager for Cagle JV, was initially in charge of recruiting

the various growers. Cagle JV began operating the new facility in April of 1995.

The Adkins Entry Into the Chicken Business

Prior to 1990 the Adkins had engaged in farming for several years. They grew corn, cotton, soybeans and peanuts, and owned cattle. During late 1990 or early 1991 the Adkins became interested in growing broiler chickens as a way to diversify their farm income. Lucius Adkins ("Lucius") spoke with the local county extension agent who put Lucius in contact with Danny Eiland. Lucius met with Eiland several times and received from Eiland a Cost and Return Estimate related to the broiler business. The estimate was based on an average bird weight of 3.7 pounds with a payment of 3.95¢ per pound. The estimate identified typical cost and expenses encountered in the business. The estimates were derived from industry averages and actual production of other farms in Georgia. The Cost and Return Estimate contained the following disclaimer:

> The figures of gross or net income as well as operating expenses and mortgage payments are for illustrative purposes only and are not intended as a projection or forecast of actual performance. Your actual gross and net income will vary in accordance with numerous factors such as your actual number of flocks per year, your financing package, operating costs and other factors.

Eiland also told the Adkins that the figures could change based on the bird size required by Cagle JV.

Lucius then met with his bank and provided the estimates to the bank. The bank agreed that the estimates

were reasonable and agreed to finance four chicken house with a Small Business Administration ("SBA") loan. At the time he obtained the loan, Lucius agreed that the estimates appeared to be reasonable and accurate. Besides discussing the estimates with the bank, Lucius discussed the broiler business with Dr. Stan Savage of the University of Georgia. Savage agreed that the estimates were reasonable.

The estimates proved to be accurate and the Adkins built two additional broiler houses in 1994. By that time Cagle JV had switched from a small 3.7 pound bird to a larger bird. Lucius admitted in depositions that the switch to a larger bird was beneficial to Cagle JV customers, even if it reduced the growers number of flocks per year. Lucius also admitted that the change in the size of the bird was not fraudulent and that the Adkins had not suffered any damages as a result of the change.

In 1995, as Cagle JV expanded it operations, the Adkins added additional houses on a new form. Lucius admitted that they were doing well and that the projections had proved to be fairly accurate. Prior to adding the new houses Lucius received new estimates from Cagle JV that he believed were accurate and reasonable.

As with the other growers, the Adkins periodically signed Boiler Prodution Agreements which set forth the obligations of Cagle JV to provide the birds, feed, medications and prompt weighing of the birds upon harvest. The agreements also set out the pay schedule for the duration of the contract. None of the contracts set forth a firm figure as to the specific number of birds to be placed in each house. All of the agreements contained the following merger clause:

K. This Agreement contains the entire agreement between the parties and includes all promises and representations, express or implied, made by the Company and the Producer and by either of them. Any prior oral or written representations not expressly set forth in this Agreement are hereby cancelled and are no longer of any force or effect. This Agreement may not be altered in any manner except by a written instrument signed by both parties.

Larger Birds and Smaller Flocks

Beginning in 1996, in order to satisfy the requirements of McDonald's, Cagle JV's main customer, Cagle JV began placing a larger bird with the growers. The bird would grow to 6 pounds or greater. For a number of reasons, such as health of the birds, Cagle JV decreased the bird placement from approximately 25,000 birds per house to approximately 23,000 birds per house. The Adkins did not complain when the flock sizes were reduced. The increase in average size made up for the loss in the number of birds. In fact, from 1997 to 2001, the average weight of the birds grown on the Adkins' farms was 6.689 pounds. In addition, the amount paid per pound per bird increased from 1997 to present from 3.95¢ to 4.8¢ per pound.

The Adkins have been growing chickens for Cagle JV for 11 years. They have met or exceeded the estimates that they were provided over the term of their relationship with Cagle JV, in spite of hiring labor to work some or all of the houses. None of the projections provided by Cagle JV provided for hired labor.

In May 1996, the Grain Inspection, Packers and Stockyard Administration ("GIPSA") inspectors observed Cagle JV employees weighing trailers containing live chickens with different tractors than trailers that were empty. As a result of that inspection, Cagle JV recalculated payments and weights from April 1, 1995, the day the Camilla plant opened, and reimbursed growers that were underpaid. Cagle JV did not penalize or charge growers that were overpaid. The audit was disclosed to all growers by letter dated September 25, 1996. GIPSA reviewed and approved of the process Cagle JV utilized.

Of the many hundreds of loads of chickens produced by the Adkins and weighed by Cagle JV, the Adkins have identified 14 weight tickets which they allege contain irregularities. Prior to this litigation, the Adkins never complained to Cagle JV about these tickets. All of the tickets predate 1995 when Cagle JV opened the new Camilla operation, The Adkins can point to no other instances prior to 1995, or after, during which the weights of the chickens were determined using different tractors.

Lucius Adkins has been a member of the United Poultry Growers Association. ("UPGA") since the 1990's. Lucius has been president of the UPGA since November 1998. Lucius admitted that no one from Cagle JV ever prevented him from being a member of the UPGA. Despite his claim that he was retaliated against for being a member of the UPGA by receiving bad birds, Lucius could provide no evidence that Cagle JV intentionally provided him with inferior birds.

In May, 1999, Cagle JV presented all growers with a new contract, at a higher payment, in exchange for an agreement to arbitrate disputes arising under the contract.

If the grower chose not to enter into the new contract, the grower could continue under the existing contract at the existing rate. The Adkins decided to reject the new contract and continued to do business under the old contract. In April, 2002, the company offered the growers a new contract at a higher rate with the option to enter into an arbitration agreement. Those who chose not to enter into the arbitration contract still received a higher rate. The Adkins can point to no evidence that they received inferior birds for refusing to accept the arbitration contract.

Plaintiffs' Complaint

On June 22, 2001, the Adkins filed a seven count complaint against Cagle JV. In Count One, Plaintiffs complain that Cagle JV violated the Packers and Stockyards Act ("PSA"), 7 U.S.C. §§ 181-231, by intentionally misweighing Plaintiffs' broilers. Count Two alleges that Cagle JV committed fraud in Court Three, Plaintiffs allege that Cagle JV violated the Georgia RICO statute. Court Four alleges fraud in the inducement/promissory estoppel. In Court Five, Plaintiffs allege breach of contact. Count Six alleges violation of the Agricultural Fair Practice Act (APPA), 7 U.S.C. §§ 2301-2306. Lastly, Court Seven seeks declaratory relief that the arbitration contacts are/were unenforceable. Cagle JV seeks summary judgment on all claims.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Court is required to "resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his or her favor." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (quotations and citations omitted).

The moving party carries the initial burden of showing that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The substantive law governing the case determines which facts are material, and "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). For issues on which the non-movant bears the burden of proof at trial, the moving party "simply may show – that is, point out to the district court – that there is an absence of evidence to support the non-moving party's cast. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case." *Fitzpatrick*, 2 F.3d at 1116 (quotations and citations omitted).

If the moving party fails to overcome this initial burden, the Court must deny the motion for summary judgment without considering any evidence, if any, presented by the non-moving party. *Fitzpatrick*, 2 F.3d at 1116. If, on the other hand, the moving party overcomes this initial burden, then the non-moving party must show the existence of a genuine issue of material fact that remains to be resolved at trial. *Id.* Moreover, the adverse

patty may not respond to the motion for summary judgment by summarily denying the allegations set forth by the moving party. Rather, the adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e).

Count I, Violation of the PSA

The PSA prohibits "unfair, unjustly discriminatory, or deceptive practices or devices," or "any undue or unreasonable preference or advantage." 7 U.S.C. §§ 192(a) and (b). In support of their PSA claims, the Adkins essentially argue that Cagle JV provided them with inferior birds, inferior feed, improperly weighed birds and by offering them the arbitration contract. The Adkins have produced no evidence that they received a substantial number of bad birds, much less that Cagle JV intentionally provided them with bad birds. Since 1992, the Adkins have received approximately 77 deliveries of birds. On seven occasions, the Adkins noted that there were bad birds delivered. In 1998 and 1999 when, the Adkins claim Cagle JV intentionally provided them with bad birds in retaliation for Lucius' involvement in the UPGA did not note the delivery of any bad birds. There were some negative comments about two flocks being "bad" or "awful" in 1999, but both flocks finished second out of the flocks placed with growers during the periods in question. There was a problem with the December, 2000, flock but the Adkins received credits in compensation.

Cagle JV produced clear and unrefuted evidence that it is virtually impossible for Cagle JV to target specific

farms for delivery of inferior birds. Besides Plaintiffs' inability to point to intentionally placed bad birds, Cagle JV records show that the average mortality rate for the Adkins' chickens actually declined after Lucius became involved in the poultry association. The mortality rate further declined in 2000 and 2001. Jill Adkins testified that their income increased after Lucius got involved in the growers association and after they declined the arbitration contract.

As to their claims of receiving insufficient or inferior feed, neither Jill nor Lucius could point to any specific instances. In fact, Jill stated that all growers had problems with feed delivery from time to time.

Their improper weighing claim is a little more problematic. As noted previously, except for questions about 14 weight tickets, neither Jill nor Lucius could identify any specific instances of misweighing of their broilers. Plaintiffs, however, point to the deposition of Bennie Morris, a security guard at the old plant and the new plant from 1987 through 1997, who was in charge of weighing the trucks. According to his testimony, there was a wide spread practice, which according to his testimony did not appear fraudulent, of weighing the trucks with different tractors and other discrepancies that could effect the live weight. According to Plaintiffs' interpretation of Morris' testimony the practice was not only wide spread but continuous and fraudulent. However, a close reading of the deposition does not support this interpretation.

First, Morris clearly states that the weighing discrepancies virtually ended when Kermit Logan became controller in August, 1987. At that time, Logan and Morris ensured that the security guards were certified by GIPSA.

From that point, Morris began strictly enforcing the proper weighing procedures and that numerous drivers were disciplined for not following procedures. He stated that he did not believe the company had a policy of intentionally misweighing the poultry to deprive the growers their pay. In fact, Morris was under the impression that a plant and its employees in another state were held criminally liable for intentionally misweighing poultry. Morris also stated that untimely weighing of birds also stopped at about the same time. While it is possible to interpret some of Morris answers that some misweighing occurred occasionally thereafter, a reasonable reading of his answers attributes these problems to sporadic failures of drivers to follow the rules or problems causing the plant to shut down temporarily. A review of a sample of weight tickets provided to Plaintiffs during the early 1990's does not support any claim that the weights were delayed to an arbitrary time in the morning. Lastly, as correctly pointed out by Cagle JV, this is not a class action. Even if Plaintiffs' interpretation of Morris testimony were true, the Adkins cannot point to a specific incident during which their birds were misweighed.

The Adkins argue that the "arbitration contracts" violate the PSA. While those accepting the arbitration contracts were paid at a higher rate for a period of time, the contracts were offered equally to all growers. In fact, that contract is not in use today and all growers are paid the same amount whether or not they accept the arbitration contract. Plaintiffs have not shown that the arbitration contracts were/are unfair as applied to them. *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995). As there is no issue of material fact on Plaintiffs' PSA claim, Cagle JV is entitled to summary judgment. Therefore,

Cagle JV's motion for summary judgment on the PSA claim (Tab 71) is **GRANTED**.[1]

Count II, Fraud

In order to prevail, under Georgia law, for common law fraud, the plaintiff must prove the following:

> (1) [A] false representation made by the defendants; (2) scienter, or knowledge of the statement's falsity at the time the statement was made; (3) an intention to induce the plaintiff to act or refrain from acting in reliance on the statement; (4) the plaintiff's justifiable reliance, and (5) damage to the plaintiff.

Pro-Fab, Inc. v. Vipa, Inc., 772 F.2d 847, 851 (11th Cir. 1985). Acts which constitute negligence do not give rise to a cause of action for fraud, *Mills v. Damson Oil Corp.*, 931 F.2d 346, 348 (5th Cir. 1991).

Plaintiffs allege that Cagle JV committed the intentional and false acts of (1) recording false trailer weights; (2) recording false tare and gross weights; (3) failure to promptly weigh Plaintiffs birds; (4) failing to weigh feed properly and provided inferior feed; and (4) providing inferior birds. As noted previously, Plaintiffs have failed to provide any admissible evidence that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's

[1] As the Court determines that the arbitration contracts did not violate the PSA, the Court **GRANTS** Cagle JV's motion for summary judgment on Plaintiffs' request for declaratory judgment that the contracts are/were unenforceable (Count VII). (Tab 71).

motion for summary judgment on the fraud claim (Tab 71) is **GRANTED**.

Count III, Georgia RICO Claim

Defendant argues that it is entitled to summary judgment on Plaintiffs' RICO claim made pursuant to Georgia law. Cagle JV argues that Plaintiffs have failed to demonstrate two or more predicate acts which are related and have continuity. *Pelletier v. Zweifel,* 921 F.2d 1465 (11th Cir. 1991). Plaintiffs' reliance either on mail fraud or theft by deception does not matter. To prove a violation of the federal mail fraud statute, Plaintiffs must show that Cagle JV: "(1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of the that scheme." *Pelletier,* 921 F.2d at 1498. To prove theft by deception, Plaintiffs must show that Cagle JV had criminal intent and knowledge, not just misrepresentation. *Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602 (1994). Plaintiffs in order to show a scheme to defraud must show "some type of deceptive conduct occurred." *Pelletier,* 921 F.2d at 1500.

Plaintiffs rely on the same allegations to support their RICO claim that they contend support their fraud claim. As with the fraud claim, the Adkins have not produced any admissible evidence to support those claims. In addition, Plaintiffs allege that Cagle JV caused fraudulent final statements to be mailed to them. As with the previous fraud claims, Plaintiff cannot point to a single statement shown to be fraudulent. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's motion for summary judgment on Plaintiff's RICO claim (Tab 71) is **GRANTED**.

Count IV, Fraudulent Inducement/Promissory Estoppel

It is well settled that "fraud cannot be predicated upon statements which are promissory in their nature as to future acts." *Warner v. Jeter,* 115 Ga. App. 6, 7 (1967). "Fraud cannot consist of mere broken promises, unfulfilled predictions or erroneous conjectures as to future events." *C.P.D. Chemical Company, Inc. V. National Car Rental Systems, Inc.,* 148 Ga. App. 756, 759 (1979). Further, "representations concerning expectations and hopes are not actionable." *Smith v. McClung,* 215 Ga. App. 786, 788 (1994).

Courts interpreting Georgia law, in cases where the plaintiff alleges fraud because the defendant promised the plaintiff that a business could be expected to generate a certain income or a certain endeavor would be profitable, have consistently held that such facts do not constitute fraud absent something more. The Georgia Court of Appeals stated as early as 1952 that:

> Insofar as the defendant relies, in support of his plea of fraud, upon representations of the seller to the effect that the business was expanding in value and would continue to make gross sales in the future of $24,000 or larger amounts, whereas as a matter of fact the business grossed only $15,000 during the twelve-month period in which it was operated by the defendant – these statements are insufficient to constitute actionable fraud. Generally, warranties relate to future events, and representations to past or existing facts, and mere unfulfilled predictions and erroneous conjectures as to future events do not constitute actionable fraud. *Rogers v. Sinclair Refining Co.,* 49 Ga.App. 72, 174 S.E. 207. 'Mere 'puffing' does not constitute legal fraud, the same

> not being calculated to really mislead a purchaser, especially when he is afforded a fall opportunity to form his own independent opinion as to the advisability of becoming a purchaser'.

Krys v. Henderson, 85 Ga.App. 323, 325 (1952). Likewise, Georgia law requires a purchaser, who is not in a fiduciary relationship, to independently investigate the representations of another. *Krys*, 85 Ga. App. at 324-325.

Despite the allegations in the complaint Plaintiffs essentially admitted during depositions that the written projections were not inaccurate. For example, the Plaintiffs complained about income projections but admitted they used outside labor, even though, Cagle JV's projections of income were dependent on the grower *not* hiring outside labor. The Plaintiffs complained that the bigger birds resulted in less flocks per year, but acknowledged that with per pound increases in pay, their income stayed the same or improved. The same is true concerning inferior birds. Plaintiffs could not show that Cagle JV intentionally placed sick birds with them because their mortality rate decreased, production increased and their income increased.

Since Cagle JV operates an integrated chicken processing operation, Plaintiffs' have been unable to find a motivation for Cagle Foods to cause problems with its supply chain by intentionally placing broilers with growers that are diseased or inferior to reduce Plaintiffs' production of chickens. Such a scheme would ultimately cause more harm to Cagle JV than the various Plaintiffs. The Plaintiffs did not blindly rely on Cagle JV's projections but independently researched the projections and found them to be reasonable.

The evidence is overwhelming that the cost and return estimates and broiler productivity projections were well based and mostly accurate. It is undisputed that the broiler production projections were based on figures provided by the primary breeders. The cost and return estimates were consistent with industry standards, and closely tracked the Plaintiffs' actual returns, if one accounts for the use of outside labor.

The Court finds that Plaintiffs have failed to put forth sufficient evidence to establish a *prima facie* case of fraud. Cagle JV is entitled to summary judgment on the Plaintiffs' fraudulent inducement count as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs fraudulent inducement claim (Tab 71) is **GRANTED**.

Promissory Estoppel

In order to prevail on a claim of promissory estoppel, the plaintiffs must show that (1) defendant made certain promises; (2) defendant should have expected that the plaintiffs would rely on such promises; and (3) plaintiffs did in fact rely on such promises to their detriment. *Doll v. Grand Union Company,* 925 F.2d 1363 (11th Cir. 1991). The Plaintiffs, however, have sought to enforce the underlying contracts and they do not dispute the validity of the contracts. When a plaintiff seeks to enforce the underlying contract, especially a promise reduced to writing, promissory estoppel is not available as a remedy. *Bank of Dade v. Reeves,* 257 Ga. 51, 53 (1987).

In addition, promissory estoppel "applies to representations of past or present facts and not to promises concerning the future, especially where those promises concern unenforceable vague future acts." *Voyles v. Sasser,* 221 Ga. App. 305, 305-306 (1996). Moreover, "there must be reasonable reliance" on the alleged promise. *Simpson Consulting, Inc. v. Barclays Bank PLC,* 227 Ga. App. 648, 657 (1997). Plaintiffs, however, refer only to representations of projected future performance of their farms.

Plaintiffs have failed to establish a *prima facie* claim for promissory estoppel. Therefore, Cagle JV is entitled to summary judgment on the Plaintiffs' promissory estoppel count as there is no genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV motion for summary judgment on Plaintiffs' promissory estoppel claim (Tab 71) is **GRANTED**.

Count V, The Agricultural Fair Practices Act

Plaintiffs also alleged that Cagle JV violated the Agricultural Fair Practices Act when its agents and employees interfered with Plaintiffs' attempt to organize and participate in a grower or poultry association and discriminated against them for such participation. Cagle JV essentially concedes that if its agents had discriminated against Plaintiffs for organizing or participating in a poultry association, it would have violated the Act.

Even though the allegations are made, Lucius testified in his depositions that he was not harassed by Cagle JV or its agents for participating in the association. Even though Lucius claims retaliation, he has not produced any evidence that Cagle JV systematically provided him with

inferior birds or feed, or forced him to accept the arbitration contract. Cagle JV is entitled to summary judgment on the Plaintiffs' Agricultural Fair Practices Act claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs' claim for violation of the AFPA (Tab 71) is **GRANTED**.

Count Six Breach of Contract

Based on all of evidence discussed so far, it is clear that Cagle JV did not breach the grower contracts that existed between the Plaintiffs and Defendant. In fact, Cagle JV increased the payment it paid per pound of broilers produced during the life of the contracts. The Plaintiffs produced near or above the projected amount of broilers during the life of the contracts. When production numbers were off, it was because of some sick birds – through no fault of either of the parties. Cagle JV is entitled to summary judgment on the Plaintiffs' breach of contract claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs claim for breach of contract (Tab 71) is **GRANTED**.

CONCLUSION

Cagle JV's motion for summary judgment on all of Plaintiffs claims (Tab 71) is **GRANTED**. Any remaining pending motions are **DENIED as moot.**

SO ORDERED, this 24th day of March, 2004.

/s/ W. Louis Sands
W. Louis Sands, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

TRAVIS MIMS and LISA MIMS, Plaintiffs, vs. CAGLE'S INC., CAGLE'S FARMS, INC. and CAGLE FOODS JV, LLC, Defendants.	1:01-CV-130-2 (WLS)

ORDER

Presently pending before the Court is Defendants Cagle Foods JV, LLC's, ("Cagle JV") motion for summary judgment. (Tab 45). For the following reasons, Defendant's motion for summary judgment (Tab 45) is **GRANTED.**

DISCUSSION

FACTUAL BACKGROUND

Cagle Foods JV's Operations

Cagle Foods JV ("Cagle JV") operates an integrated poultry processing complex based in Camilla, Georgia, where it produces chicken meat for McDonald's Restaurants. Cagle JV's operation is comprised of a slaughtering plant, a processing facility, a feed mill, a hatchery and numerous contract farming facilities. The complex produces a significant portion of McDonald's daily chicken requirements.

An integrated chicken processing operation is a complex and inclusive endeavor. Cagle JV purchases baby

hens (pullets), to lay eggs only, and roosters from outside breeders. These breeders are independent companies that conduct genetic testing and develop different breeds of chickens with different characteristics. The main characteristic that companies such as Cagle JV are interested in is breeds which yield a large amount of meat.

After purchasing the chicks, Cagle JV places the birds with contract "pullet growers" who care for and raise the birds from approximately 2 days old until approximately 20 weeks old. Cagle JV provides the feed, medication and other support to the growers. The pullet growers provide the chicken houses and the labor. The hens will only be used to lay eggs which will be hatched, raised and slaughtered.

At approximately 20 weeks old, Cagle JV transports the chickens from the pullet growers to farms owned by contract "breeder growers." At the breeder farms, the chickens lay eggs which are collected by the growers and delivered to the hatchery owned by Cagle JV. The birds remain on the breeder farm until they are approximately 65 weeks old, when the birds are then collected and sold to outside companies for slaughter, Cagle JV retains ownership of the birds and the eggs and Cagle JV provides feed, medication and support services to the breeder growers. The breeder growers are paid per dozen eggs produced along with performance bonuses.

The chicks from the hatchery are then taken to "broiler growers" who raise the birds for eventual slaughter and processing at Cagle JV's processing plant. The Plaintiffs are broiler growers. Cagle JV processes approximately 250,000 chickens a day. As with the other growers, Cagle JV maintains ownership of the chickens

and provides the broiler growers with feed, medication and support services. The broiler growers provide the chicken houses and labor. The broiler growers are paid based on the weight of chickens upon delivery to the processing facility. The main goal of Cagle JV's contract grower operation is to produce birds with the maximum meat possible. Any problems in the supply chain, such as poor egg production, disease, or high mortality rate at the growers' farms significantly impacts Cagle JV's ability to provide chicken to its customers.

History of the Cagle Food JV Camilla Complex

Cagle's, Inc. ("Cagle's") operated an intergrated poultry processing complex in northern Florida prior to 1993. Part of its operation included a small processing plant in Camilla, Georgia. Around 1993, Cagle's began to plan to move its operations from northern Florida to southern Georgia.

In March, 1993, Cagle's entered into a joint venture with Keystone Foods, LLC. ("Keystone") to produce chicken meat. The joint venture created an independent company, Cagle JV, to operate the joint venture. Cagle JV expanded the Camilla facility to include starting the integrated production of chicken meat in south Georgia. As part of the expansion of the Camilla facility, Cagle JV began recruiting the various growers needed for the integrated production of chicken meat. Danny Eiland, the Live Operations Manager for Cagle JV, was initially in charge of recruiting the various growers. Cagle JV began operating the new facility in April of 1995.

The Mims' Entry Into the Chicken Business

Travis Mims became interested in the chicken business in 1993. Before meeting with people from Cagle JV, Mims met with couple of farmers that were raising broilers for Cagle JV. One grower told Mims that growing chickens is a "seven day a week" job, year round. The other grower explained the general day-to-day operations, the revenues associated with the business, and gave Mims information about potential contractors and financing information. The farmers explained, and Mims understood, that until the chicken houses were paid off, he would not get rich and that at times cash flow would be very limited. Even so, they recommended he talk to Eiland if Mims was still interested.

In Late 1993 or early 1994, Mims attended a meeting in Colquit County, Georgia, where Eiland spoke to a group about Cagle JV plans to expand and the need to recruit contract chicken farmers. Eiland explained that a four house farm would cost approximately $400,000. He explained that there were various forms of financing options available, including SBA loans. Mims testified in his deposition that Eiland was up front about the expenses and returns and that his projections were consistent with his discussions with one of the farmers Mims had previously talked with. After the meeting, Mims spoke with Ed Horton, his banker, who informed him that a Camilla bank was putting together financing packages for farmers wanting to get into the business. Mims also met with Eiland who provided him with a Cost and Return Estimate and a list of approved contractors.

Based on the estimate, Mims expected a payment of 3.95¢ per pound, a gross income for four houses of $106,

520, with a net of $24,858. In addition, the estimate informed Mims that it take approximately 55 days to produce a flock with about ten days between flocks. The estimate identified typical cost and expenses encountered in the business. The estimates were derived from industry averages and actual production of other farms in Georgia and consistent with his discussions with another farmer. The Cost and Return Estimate contained the following disclaimer:

> The figures of gross or net income as well as operating expenses and mortgage payments are for illustrative purposes only and are not intended as a projection or forecast of actual performance. Your actual gross and net income will vary in accordance with numerous factors such as your actual number of flocks per year, your financing package, operating costs and other factors.

Eiland also told the Mims that the figures could change based on the bird size required by Cagle JV. Mims understood that the estimates were not guarantees.

On or about January 24, 1994, Mims received a Letter Of Intent from Eiland allowing Mims to enter into the chicken business. The letter contained the following disclaimer:

> No other representations or understandings, except as specifically provided herein shall be of any force and effect unless in a writing signed by an authorized representative of Cagles Food JV, LLC.

Mims financed his four houses through an SBA loan facilitated by P&C Bank. Mims was represented through the entire process by a lawyer who reviewed the cost and

return estimate. Mims executed the loan note of $403,000 on or about May 18, 1994. Around the same time, Mims executed his first Broiler Production Agreement. As with the other growers, Mims periodically signed Boiler Produtions Agreements which set forth the obligations of Cagle JV to provide the birds, feed, medications and prompt weighing of the birds upon harvest. The agreements also set out the pay schedule for the duration of the contract. None of the contracts set forth a firm figure as to the specific number of birds to be placed in each house. All of the agreements contained the following merger clause:

> K. This Agreement contains the entire agreement between the parties and includes all promises and representations, express or implied, made by the Company and the Producer and by either of them. Any prior oral or written representations not expressly set forth in this Agreement are hereby cancelled and are no longer of any force or effect. This Agreement may not be altered in any manner except by a written instrument signed by both parties.

Mims read and understood the merger clause. Although the estimates provided a pay rate of 3.95¢ per pound, Cagle JV agreed to pay Mims 4.2¢ per pound. Near the end of his first flock, Cagle JV raised the rate of pay to 4.3¢ per pound.

Larger Birds and Smaller Flocks

Beginning in 1996, in order to satisfy the requirements of McDonald's, Cagle JV's main customer, Cagle JV began placing a larger bird with the growers. The bird would grow to 6 pounds or greater. For a number of reasons, such as health of the birds, Cagle JV decreased

the bird placement from approximately 25,000 birds per house to approximately 23,000 birds per house. Mims did not complain when the flock sizes were reduced. The increase in average size made up for the loss in the number of birds. In fact, from 1996 to 2000, the average weight of the birds grown on the Mims' farms was 6.53 pounds. In addition, the amount paid per pound per bird increased from 1994 to 2000 from 4.2¢ to 4.5¢ per pound.

Mims Performance as a Grower

The Cagle JV cost and return estimate provided an estimated gross income of $106,520 per year. Mims earned approximately $118,500 during his worst year and over $153,000 in his best year, Even though the Cagle JV estimate did not provide for the cost of labor, Mims hired workers in 1995.

Mims had several flock supervisors while he was a grower and each rated him as a below average grower. They noted numerous uncorrected problems at his farm and at another farm he managed for another farmer. Mims apparently never contested the observations or evaluations.

In 1999, Mims developed prostatitis that required surgery. As a result of the pain, Mims developed a dependancy on prescription pain killers that required him to be hospitalized for rehabilitation in 1999 and 2001. During these periods, his wife, Lisa Mims ("Lisa"), and another farmer, Rick Wheeler, were forced to supervise the chicken houses. Lisa also hired an additional employee. Travis' illnesses and hospitalizations put a heavy strain on the Mims' financial situation.

During this period, January of 1999, Mims was hired by James Tyson to manage his six broiler house farm. Mims agreed to manage the farm for 27% of the gross, with Mims responsible for paying for hired labor. Mims managed the farm until the Spring of 2001.

When Mims started managing Tyson's farm its productivity declined. Of the last 5 flocks, the Tyson farm finished last, compared to other growers, four times. As a result of the declining productivity, Cagle JV representatives spoke with Tyson. Starting around December 2000, Cagle JV began sending weekly service reports directly to Tyson. The reports reflected that Mims management of the farm was substandard and affecting productivity. Tyson agreed with the assessments and during the Spring of 2001 decided to get out of the business and sold his farm.

In late 2000, Mims decided that he wanted to sell his farm. At about the same time, Mims informed his flock supervisor that after the current flock was completed, he did not want any more birds placed on his farm. On October 16, 2000, Mims met with Bobby Land, Cagle JV's broiler manager and confirmed that he did not want to continue to grow chickens. A short time later, Mims told his flock supervisor he had changed his mind. The supervisor told Mims to set up a meeting with Land.

On November 13, 2000, Mims went to the processing plant to deliver a check and ran into the Operations Manager, Gene Mullins. Mullins told Mims that he had heard about Mims decision to get out of the business. Mims explained that he wanted out because he could not handle the pressures of the business since his illness and subsequent addiction. The two also reviewed a list of repairs needed at Mims' farm.

After the meeting, Mullins sent Mims a letter confirming their conversation about getting out of the business and the repairs. Mims took Mullins' letter and Mims' proposed response to his attorney. The attorney never mailed Mims' response. On December 8, 2000, Mullins sent another letter to Mims requesting that he tell Cagle JV of his intentions. On December 18, 2000, Mims' attorney informed Cagle JV that Mims wanted another flock and that the repairs had been made. When Mullins inspected the farm, he discovered that it was not ready for another placement.

After making the necessary repairs, Cagle JV placed another flock on Mims' farm on January 15, 2001. As with his previous flocks, Mims performed poorly and Cagle JV performed the required monitoring of the flock. Soon thereafter, Mims filed for bankruptcy. After the flock was complete, Cagle JV formally terminated its relationship with Mims on March 5, 2001.

Weighing Problems

In May 1996, the Grain Inspection, Packers and Stockyard Administration ("GIPSA") inspectors observed Cagle JV employees weighing trailers containing live chickens with different tractors than trailers that were empty. As a result of that inspection, Cagle JV recalculated payments and weights from April 1, 1995, the day the Camilla plant opened, and reimbursed growers that were underpaid. Cagle JV did not penalize or charge growers that were overpaid. The audit was disclosed to all growers by letter dated September 25, 1996. GIPSA reviewed and approved of the process Cagle JV utilized. Mims was given a payment of $810 for possible underpayment and was not

charged for overpayment of $406. Of the many loads of chickens produced by the Mims' and weighed by Cagle JV, they have not pointed to any specific instances where his chickens were not weighed properly.

Travis Mims attended numerous meetings of the United Poultry Growers Association ("UPGA") before joining in June of 1999. Since the 1990's, Mims admitted that no one from Cagle JV ever prevented him from being a member of the UPGA. Despite his claim that he was retaliated against for being a member of the UPGA by receiving bad birds, Mims could provide no evidence that Cagle JV intentionally provided him with inferior birds.

In May, 1999, Cagle JV presented all growers with a new contact, at a higher payment, in exchange for an agreement to arbitrate disputes arising under the contract. If the grower chose not to enter into the new contract, the grower could continue under the existing contract at the existing rate. Mims decided to reject the new contract and continued to do business under the old contract. In April, 2002, the company offered the growers a new contract at a higher rate with the option to enter into an arbitration agreement. Those who chose not to enter into the arbitration contract still received a higher rate. Mims can point to no evidence that they received inferior birds for refusing to accept the arbitration contract.

Plaintiffs' Complaint

On June 22, 2001, the Mims' filed a seven count complaint against Cagle JV. In Count One, Plaintiffs complain that Cagle JV violated the Packers and Stockyards Act ("PSA"), 7 U.S.C, §§ 181-231, by intentionally misweighing Ptaintiffs' broilers. Count Two alleges that

Cagle JV committed fraud. In Court Three, Plaintiffs allege that Cagle JV violated the Georgia RICO statute. Court Four alleges fraud in the inducement/promissory estoppel. In Court Five, Plaintiffs allege breach of contract. Count Six alleges violation of the Agricultural Fair Practice Act (AFPA), 7 U.S.C.§§ 2301-2306. Lastly, Court Seven seeks declaratory relief that the arbitration contracts are/were unenforceable. Cagle JV seeks summary judgment on all claims.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Court is required to "resolve all reasonable doubts about the facts in favor of the non-movant, and draw all justifiable inferences in his or her favor." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (quotations and citations omitted).

The moving party carries the initial burden of showing that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The substantive law governing the case determines which facts are material, and "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). For issues on which the non-movant bears the

burden of proof at trial, the moving party "simply may show – that is, point out to the district court – that there is an absence of evidence to support the non-moving party's case. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case." *Fitzpatrick*, 2 F.3d at 1116 (quotations and citations omitted).

If the moving party fails to overcome this initial burden, the Court must deny the motion for summary judgment without considering any evidence, if any, presented by the non-moving party. *Fitzpatrick*, 2 F.3d at 1116. If, on the other hand, the moving party overcomes this initial burden, then the non-moving party must show the existence of a genuine issue of material fact that remains to be resolved at trial. *Id.* Moreover, the adverse party may not respond to the motion for summary judgment by summarily denying the allegations set forth by the moving party. Rather, the adverse party "must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(c).

Count I Violation of the PSA

The PSA prohibits "unfair, unjustly discriminatory, or deceptive practices or devices," or "any undue or unreasonable preference or advantage." 7 U.S.C. §§ 192(a) and (b). In support of their PSA claims, the Mims' essentially argue that Cagle JV provided them with inferior birds, inferior feed, improperly weighed birds and by offering them the arbitration contract.

The Mims' have produced no evidence that they received a substantial number of bad birds, much less that Cagle JV intentionally provided them with bad birds. Since 1994, the Mims' have received approximately 34 deliveries of birds. The Mims' only identified four flocks that allegedly contained inferior birds. However, Mims never noted that alleged deficiencies on the Chick Delivery Reports or kept any records documenting such deficiencies. Cagle JV produced clear and unrefuted evidence that it is virtually impossible for Cagle JV to target specific farms for delivery of inferior birds.

As to their claims of receiving insufficient or inferior feed, the Mims' identified only three instances during the seven years they grew chickens when Cagle JV failed to timely deliver feed or to pick up their birds. The feed delay was the result of the feed mill breaking down. The delay in picking up the birds was the result of bomb threats at the Camilla plant and a lighting strike. Mims also claims he was improperly charged for feed that was not delivered for his July 30, 1998 flock. While Cagle JV's flock supervisor confirmed that the feed bins remained empty after the mill recorded a delivery, the supervisor was never informed that Mims was charged for feed that was not delivered.

Their improper weighing claim is a little more problematic. As noted previously, neither Lisa nor Travis could identify any specific instances of misweighing of their broilers. Plaintiffs, however, point to the deposition of Bennie Morris, a security guard at the old plant and the new plant from 1987 through 1997, who was in charge of weighing the trucks. According to his testimony, there was a wide spread practice, which according to his testimony did not appear fraudulent, of weighing the trucks with different tractors and other discrepancies that could effect

the live weight. According to Plaintiffs' interpretation of Morris' testimony, the practice was not only wide spread but continuous and fraudulent. However, a close reading of the deposition does not support this interpretation.

First, Morris clearly states that the weighing discrepancies virtually ended when Kermit Logan became controller in August, 1987. At that time, Logan and Morris ensured that the security guards were certified by GIPSA. From that point, Morris began strictly enforcing the proper weighing procedures and that numerous drivers were disciplined for not following procedures. He stated that he did not believe the company had a policy of intentionally misweighing the poultry to deprive the growers their pay. In fact, Morris was under the impression that a plant and its employees in another state were held criminally liable for intentionally misweighing poultry. Morris also stated that untimely weighing of birds also stopped at about the same time. While it is possible to interpret some of Morris answers that some misweighing occurred occasionally thereafter, a reasonable reading of his answers attributes these problems to sporadic failures of drivers to follow the rules or problems causing the plant to shut down temporarily. A review of a sample of weight tickets provided to Plaintiffs during the 1994 and 1995 does not support any claim that the weights were delayed to an arbitrary time in the morning. Lastly, as correctly pointed out by Cagle JV, this is not a class action. Even if Plaintiffs' interpretation of Morris testimony were true, the Mims' cannot point to a specific incident during which their birds were misweighed.

The Mims' argue that the "arbitration contracts" violate the PSA.[1] While those accepting the arbitration contracts were paid at a higher rate for a period of time, the contracts were offered equally to all growers. In fact, the contract complained of is not in use today and all growers are paid the same amount whether or not they accepted the arbitration contract. It cannot be said that the arbitration contracts were/are unfair as applied to the Mims. *Jackson v. Swift-Eckrich, Inc.*, 53 F.3d 1452 (8th Cir. 1995). As there is no genuine issue of material fact on Plaintiffs' PSA claim, Cagle JV is entitled to summary judgment. Therefore, Cagle JV's motion for summary judgment on the PSA claim (Tab 45) is **GRANTED**.[2]

Count II, Fraud

In order to prevail, under Georgia law, for common law fraud, the plaintiff must prove the following:

> (1) [A] false representation made by the defendants; (2) scienter, or knowledge of the statement's falsity at the time the statement was made; (3) an intention to induce the plaintiff to act or refrain from acting in reliance on the statement; (4) the plaintiff's justifiable reliance; and (5) damage to the plaintiff.

Pro-Fab. Inc. v. Vipa. Inc., 772 F.2d 847, 851 (11th Cir. 1985). Acts which constitute negligence do not give rise to

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[1] Defendant argues that this claim is mooted by the fact that the Mims no longer grow chickens for Cagle JV.

[2] As the Court determines that the arbitration contracts did not violate the PSA, the Court **GRANTS** Cagle JV's motion for summary judgment on Plaintiffs' request for declaratory judgment that the contracts are/were unenforceable (Count VII). (Tab 45).

a cause of action for fraud. *Mills v. Damson Oil Corp.*, 931 F.2d 346, 348 (5th Cir. 1991).

Plaintiffs allege that Cagle JV committed the intentional and false acts of (1) recording false trailer weights, (2) recording false tare and gross weights; (3) failure to promptly weigh Plaintiffs birds; (4) failing to weigh feed properly and provided inferior feed; and (4) providing inferior birds. As noted previously, Plaintiffs have failed to provide any admissible evidence that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's motion for summary judgment on the fraud claim (Tab 45) is **GRANTED**.

Count III, Georgia RICO Claim

Defendant argues that it is entitled to summary judgment on Plaintiffs' RICO claim made pursuant to Georgia law. Cagle JV argues that Plaintiffs have failed to demonstrate two or more predicate acts which are related and have continuity. *Pelletier v. Zweifel,* 921 F.2d 1465 (11th Cir. 1991). Plaintiffs' reliance either on mail fraud or theft by deception does not matter. To prove a violation of the federal mail fraud statute, Plaintiffs must show that Cagle JV: "(1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of the that scheme." *Pelletier,* 921 F.2d at 1498. To prove theft by deception, Plaintiffs must show that Cagle JV had criminal intent and knowledge, not just misrepresentation. *Avery v. Chrysler Motors Corp.*, 214 Ga. App. 602 (1994). Plaintiffs in order to show

a scheme to defraud must show "some type of deceptive conduct occurred." *Pelletier* 921 F.2d at 1500.

Plaintiffs rely on the same allegations to support their RICO claim that they contend support their fraud claim. As with the fraud claim, the Mims' have not produced any admissible evidence to support those claims. In addition, Plaintiffs allege that Cagle JV caused fraudulent final statements to be mailed to them. As with the previous fraud claims, Plaintiffs cannot point to a single statement shown to be fraudulent. Therefore, as there is no genuine issue of material fact as to this claim, Cagle JV's motion for summary judgment on Plaintiff's RICO claim (Tab 45) is **GRANTED**.

Count IV. Fraudulent Inducement/Promissory Estoppel

It is well settled that "fraud cannot be predicated upon statements which are promissory in their nature as to future acts," *Warner v. Jeter*, 115 Ga. App. 6, 7 (1967). "Fraud cannot consist of mere broken promises, unfulfilled predictions or erroneous conjectures as to future events." *C.P.D. Chemical Company, Inc. V. National Car Rental Systems, Inc.*, 148 Ga. App. 756, 759 (1979). Further, "representations concerning expectations and hopes are not actionable." *Smith v. McClung*, 215 Ga. App. 786, 788 (1994).

Courts interpreting Georgia law, in cases where the plaintiff alleges fraud because the defendant promised the plaintiff that a business could be expected to generate a certain income or a certain endeavor would be profitable, have consistently held that such facts do not constitute fraud absent something more. The Georgia Court of Appeals stated as early as 1952 that:

> Insofar as the defendant relies, in support of his plea of fraud, upon representations of the seller to the effect that the business was expanding in value and would continue to make gross sales in the future of $24,000 or larger amounts, whereas as a matter of fact the business grossed only $15,000 during the twelve-month period in which, it was operated by the defendant – these statements are insufficient to constitute actionable fraud. Generally, warranties relate to future events, and representations to past or existing facts, and mere unfulfilled predictions and erroneous conjectures as to future events do not constitute actionable fraud. *Rogers v. Sinclair Refining Co.*, 49 Ga.App. 72, 174 S.E. 207. 'Mere 'puffing' does not constitute legal fraud, the same not being calculated to really mislead a purchaser, especially when he is afforded a full opportunity to form his own independent opinion as to the advisability of becoming a purchaser'.

Krys v. Henderson, 85 Ga.App. 323, 325 (1952). Likewise, Georgia law requires a purchaser, who is not in a fiduciary relationship, to independently investigate the representations of another. *Krys*, 85 Ga. App. at 324-325.

Despite the allegations in the complaint, Plaintiffs essentially admitted during depositions that the written projections were not inaccurate. For example, the Plaintiffs complained about income projections but admitted they used outside labor, even though, Cagle JV's projections of income were dependent on the grower *not* hiring outside labor. The Plaintiffs complained that the bigger birds resulted in less flocks per year, but acknowledged that with per pound increases in pay, their income stayed the same or improved. The same is true concerning inferior birds. Plaintiffs could not show that Cagle JV intentionally placed sick birds.

Also, Travis Mims' poor farm management contributed to his poor performance.

Since Cagle JV operates an integrated chicken processing operation, Plaintiffs have been unable to find a motivation for Cagle Foods to cause problems with its supply chain by intentionally placing broilers with growers that are diseased or inferior to reduce Plaintiffs' production of chickens. Such a scheme would ultimately impact Cagle JV more than the various Plaintiffs. The Plaintiffs did not blindly rely on Cagle JV's projections but independently researched the projections and found them to be reasonable.

The evidence is overwhelming that the cost and return estimates and broiler productivity projections were well based and mostly accurate. It is undisputed that the broiler production projections were based on figures provided by the primary breeders. The cost and return estimates were consistent with industry standards, and closely tracked the Plaintiffs' actual returns, if one accounts for the use of outside labor and poor farm management.

The Court finds that Plaintiffs have failed to put forth sufficient evidence to establish a *prima facie* case of fraud. Cagle JV is entitled to summary judgment on the Plaintiffs' fraudulent inducement count as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs fraudulent inducement claim (Tab 45) is **GRANTED**.

Promissory Estoppel

In order to prevail on a claim of promissory estoppel, the plaintiffs must show that (1) defendant made certain promises; (2) defendant should have expected that the plaintiffs would rely on such promises; and (3) plaintiffs did in fact rely on such promises to their detriment. *Doll v. Grand Union Company*, 925 F.2d 1363 (11th Cir. 1991). The Plaintiffs, however, have sought to enforce the underlying contracts and they do not dispute the validity of the contracts. When a plaintiff seeks to enforce the underlying contract, especially a promise reduced to writing, promissory estoppel is not available as a remedy. *Bank of Dade v. Reeves*, 257 Ga. 51, 53 (1987).

In addition, promissory estoppel "applies to representations of past or present facts and not to promises concerning the future, especially where those promises concern unenforceable vague future acts." *Voyles v. Sasser*, 221 Ga. App. 305, 305-306 (1996). Moreover, "there must be reasonable reliance" on the alleged promise. *Simpson Consulting, Inc. v. Barclays Bank PLC*, 227 Ga. App. 648, 657 (1997). Plaintiffs, however, refer only to representations of projected future performance of their farms.

Plaintiffs have failed to establish a *prima facie* claim for promissory estoppel. Therefore, Cagle JV is entitled to summary judgment on the Plaintiffs' promissory estoppel count as there is no genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs' promissory estoppel claim (Tab 45) is **GRANTED**.

Count V, The Agricultural Fair Practices Act

Plaintiffs also alleged that Cagle JV violated the Agricultural Fair Practices Act when its agents and employees interfered with Plaintiffs' attempt to organize and participate in a grower or poultry association and discriminated against them for such participation. Cagle JV essentially concedes that if its agents had discriminated against Plaintiffs for organizing or participating in a poultry association, it would have violated the Act.

Even though the allegations are made, Travis testified in his depositions that he was not harassed by Cagle JV or its agents for participating in the association. Even though the Mims' claim retaliation, they have not produced any evidence that Cagle JV systematically provided them with inferior birds or feed, or forced them to accept the arbitration contract. Cagle JV is entitled to summary judgment on the Plaintiffs' Agricultural Fair Practices Act claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs' claim for violation of the AFPA (Tab 45) is **GRANTED**.

Count Six, Breach of Contract

Based on all of evidence discussed so far, it is clear that Cagle JV did not breach the grower contracts that existed between the Plaintiffs and Defendant. In fact, Cagle JV increased the payment it paid per pound of broilers produced during the life of the contracts. The Plaintiffs earned near the projected amount during the life of the contacts. When production numbers were off, the available evidence shows that it was because of Travis'

illness and inability to properly manage his farm. Cagle JV is entitled to summary judgment on the Plaintiffs' breach of contract claim as there is not a genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law. Therefore, Cagle JV's motion for summary judgment on Plaintiffs claim for breach of contract (Tab 45) is **GRANTED**.

CONCLUSION

Cagle JV's motion for summary judgment on all of Plaintiffs claims (Tab 45) is **GRANTED**. Any remaining pending motions are **DENIED as moot**.

SO ORDERED, this 25th day of March, 2004.

/s/ W. Louis Sands
W. Louis Sands, Chief Judge
United States District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15431-FF

MARK GLASS,
MARK A. GLASS
ENTERPRISES, INC.,

Plaintiffs-Counter-
Defendants-Appellants,

versus

CAGLE'S INC.,
CAGLE'S FARMS, INC.,
CAGLE FOODS JV, LLC,

Defendants-Appellees,

d.b.a. Cagle-Keystone Foods,

Defendant-Counter-
Claimant-Appellee.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Jun. 1, 2005)

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: HULL, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ William H. Pryor, Jr.
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

[Exhibit Attached To Plaintiffs'
Response To Summary Judgment]

Expert Opinion: Chick Quality, Its Effect on Broiler Performance at Cagles
Dr. Paul G. Miller PhD, DVM

Chick quality is very influential, plays a very important role in broiler performance. Many of the problems a broiler grower faces during the growout period could have their roots in congenital causes.

In producing finished broilers, basically the company provides the chicks, the feed, the vaccines, technical expertise and whatever medications may be necessary. On the other hand, the grower provides the farm, the equipment, the utilities and the labor to manage, house and care for the chicks. Neither one of these components can compensate for a deficiency in the other. In particular, good farm management cannot compensate for poor quality chicks or other shortcomings on the company side of this arrangement.

In some cases, the negative impact of poor quality chicks on grower performance is obvious. Examples would include chicks that are chilled, overheated, oxygen deprived or dehydrated. In these cases, the chick suffers such extreme damage at the level of body tissues and organs that its body systems simply cannot recover adequate function for the chick to thrive.

Beyond that, chick quality can be far more subtle. Adverse circumstances during incubation and hatching in such aspects as temperature, humidity, sanitation and ventilation

can produce congenital chick damage at the body tissue and organ level that degrade the chick's performance during its growing period as a broiler.

Chicks can acquire congenital infectious diseases in the hatchery during incubation and/or hatching. Chicks can also acquire infectious diseases through the egg either from the mother hen or from breeding farm egg mishandling. In either case, congenital infectious diseases can have a devastating effect on the performance of the chick. A few such infections agents would include, but not be limited to, Salmonella, E. coli, Aspergillus, Avian Encephalitis, Mycoplasmas, REOvirus, etc. This group would also include the Staphylococcus bacteria that causes Femoral Head Necrosis and leg problems later in the growout, as the chick begins to put on weight. Also included in this general category might be chicks produced by older hens; eggs produced by older hens tend to have more porous shells, and these tend to be more susceptible to and predisposed to bacterial infections invading through their porous shells.

Congenital nutritional deficiencies also can degrade broiler performance. Eggs from young breeder hens, just entering into egg production, are produced by an ovary and an oviduct that might not yet be in adequate reproductive condition and tone. Thus eggs set from young hens too early in the onset of the reproductive cycle could lack adequate nutrients necessary to produce a vigorous, robust chick. Beyond this, inadequate maternal nutrition at any time during the production cycle could produce a weaker, less vigorous chick.

Similarly congenital immunological deficiencies can lead to disease and degraded broiler performance during the grow out. The initial circulating antibodies in the broiler

chick come from its mother through the egg. Thus adequate vaccination of the mother flock is necessary to insure adequate passive transfer of antibody protection to the chick. It is also very important that the vaccination program of the broiler flock and the mother flocks be coordinated by the integrator to insure proper development of the chick's immune system as its maternal antibody becomes depleted. This is especially important since one broiler flock usually comes from several different mother flocks. If such coordination does not happen, the chick's immune system might not develop adequately, and it could develop infectious diseases later in the growout.

Beyond these considerations, parent breed selection is made by the integrator, and yet has a great influence on broiler performance. Many of today's high performing strains of broilers have been selected largely for meat yield and other processing and marketing parameters, often at the expense of production parameters such as chick livability, chick vigor and disease resistance.

Applying the above to the Case of Glass et al. vs Cagles, I submit the following for the court's consideration in support of an allegation of poor chick quality in the law suits involved. I personally visited all four farms involved in the lawsuit on February 15, '03 with Mrs. Cindy Johnson, and personally visited with the growers involved and inspected their birds, farms and equipment; in all, we visited four farms.

The Glass Enterprises Farm had two day old chicks when I visited. With very little effort, I was able to find a handful of chicks (6 or 7 chicks) with lesions indicating poor chick quality such as sore hocks and hard plugs. I also found one with an open navel and its intestines hanging

cut, and another chick with a crossed beak. I'm sure that, if I had looked further, I would have found more.

Beyond my visit, I also have received numerous documents relating to this case from Mrs. Johnson. Among these, there are letters from three well respected poultry veterinarians indicating that Cagles-Keystone has had ongoing chick quality problems.

In two separate letters spanning a two year period, the first dated July 1, '99 and the second dated June 15, '01, Dr. Keith Honegger explicitly states that Reovirus is a major factor in the leg problems Cagles has been experiencing. He also makes several recommendations to remedy this in the form of vaccination of the mother flocks and the broiler flock; in particular, Dr. Honegger recommends an additional Reovirus vaccination of the breeder pullets at 5 to 6 weeks of age. Despite Dr. Honegger's recommendation, Cagles still did not vaccinate breeder pullets at 6 weeks of age; according to a vaccination program dated August 5, '99, Reovirus vaccinations were still given to breeder pullets only at one day of age and at 11 weeks of age. In my visit to the Cyprus Bottom Farm on February 15, '03, I also found numerous leg problems in five week old broilers, and concur with Dr. Honegger that Reovirus could be a significant factor.

The second letter is from an expert on chick quality, Dr. Linnea Newman, who points out in a letter dated March 23, '00 that Aspergillus's, a fungal infection, is a significant chick quality issue at Cagle's hatchery. Her findings are reinforced by a Hatchery Microbiological Evaluation report dated December 24, '99 of fungal samples taken from various machines and other locations in Cagle's hatchery; the report contains 5 entries for fungal counts of 'TNTC', which means 'too numerous to count'.

The third letter, dated January 4, '01, is from Dr. Kalen Cookson who points out that Cagles has a significant Gumboro problem. Gumboro is a disease that attacks the chick's immune system, leaving it vulnerable to other diseases and causing vaccination for other diseases to fail; classic Gumboro usually infects chicks between 18 and 26 days of age, and the more virulent strains can strike at a younger age. In his letter, Dr. Cookson explicitly states that both Mark Glass Farm and Cyprus Bottom Farm have the early attacking, virulent form of Gumboro. Despite this, during my visit on February 15, Mark Glass told me that Cagles does not have him vaccinating his broilers for Gumboro.

In summary, chick quality has been a problem at Cagles during the time periods covered by the law suits. In addition to my own findings, three other poultry veterinarians have indicated various issues of the chick quality at Cagles: Reovirus, Aspergillus and Gumboro. I hope that the above shows that the chick quality problem at Cagles is not one dimensional or an isolated incident; rather it is an ongoing, multifaceted problem that Cagles has done little to address or correct.

Qualifications Statement for Dr. Paul G. Miller

Education:

- Oklahoma State University College of Veterinary Medicine, Stillwater, Oklahoma. '92. Doctor of Veterinary Medicine. Poultry specialty was done at the University of Arkansas in Fayetteville during the fall semester of '91.
- Case Institute of Technology, Cleveland, Ohio. '68. Ph. D.

- Marquette University, Milwaukee, Wisconsin. '63. B.S.

Work Experience:

- Georgia Poultry Lab branch in Dalton, Georgia. '92 to '00. Poultry Veterinarian: ran branch lab; was responsible for diagnosis of poultry diseases in broilers and other types of birds. Also did monitor work, field work and inspections for regulatory requirements.
- Pietrus Foods in Sleepy Eye, Minnesota. Summers during the '70s. Did breeding and genetics, hatchery work, processing and field service work on roasters and a variety of specialty poultry species including waterfowl, guineas and capons.

Publications: I am a minor, contributing author on two articles in the journal Avian Diseases. In both articles, I contributed some diagnostic effort to the authors' research project, but had no role in the research itself.

Compensation: I am being paid at the rate of $125 per hour for time spent on these cases.

Other Cases in which I participated as an expert witness:

- Shepherd vs Cagles; U.S. District Court; Northern District of Georgia; Rome Division, Fall, 2001. As a deposition witness.
- Burger vs Cagles; U.S. District Court; Northern District of Georgia; Rome Division, February, '99. As a trial testimony witness.

/s/ Dr. Paul G. Miller

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

[Exhibit Attached To Plaintiffs'
Response To Summary Judgment]

Rebuttal to Expert Opinion
Report of Dr. Dennis P. Wages

Dr. Paul G. Miller

The commentary written by Dr. Wages has failed to change any of my opinions as expressed in my earlier (3-6-03) Expert Opinion. However, some points of clarification might be helpful.

Seven day mortality is presented by Dr. Wages as a 'ruler' to measure chick quality. From the point of view of the hatchery management, this has some merit. However, from the point of view of the broiler grower (i.e. the plaintiffs), performance over the entire growout and final settlement should be the criterion. I do not at all agree that the adverse effects of poor chick quality end after seven days. The negative effects of poor chick quality persist throughout the entire grow out period.

Regarding the reference Dr. Wages makes to the letter from Dr. Linnea Newman on March 23, 2000, I have the following comments. The comment Dr. Wages quotes about poor brooder management is specifically directed to Grady Farms and Benny Williams. She makes no comments critical of any of the plaintiffs in this litigation. In addition, in her summary section on page 3, referring to the Aspergillus problem Cagles is having, she states 'This would tend to point the finger at the hatchery as the source.'

In regard to the performance of poor quality chicks, it should be obvious that chick quality is a hatchery and breeding issue. When poor quality chicks arrive on the broiler farm, all the grower can do is his best. It is impossible for the broiler grower to undo and reverse all the effects of disease, dehydration, chilling, etc; hence some of the residual effects of these chick quality problems will persist into the grow out, resulting in higher mortality, poor feed conversion, leg problems, various diseases, etc. Thus some of the residual problems from poor chick quality persist throughout the grow out period, and cannot be corrected by the broiler grower.

In reference to chicks from young mother hens, Dr. Wages seems to reinforce my assertion of lack of adequate nutrients by stating (p.11 of his paper) 'Chicks from young breeder flocks tend to have more dehydration and starve out problems.'

Regarding my visit to the Glass Enterprises Farm, the ease with which I could find cull chicks, that is by merely taking a few steps into the flock, indicates that there was a significant percentage of culls in the flock. I did not specifically quantify the number.

Regarding Dr. Keith Honegger's letters, I agree that he does not say that reovirus is a 'major problem'. However, he does point out that reovirus is a major factor in the leg problems: 'No doubt REO challenge is playing a role in some of the broiler disease problems' (P4; June 15, '01 letter).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS and JILL ADKINS, Plaintiffs, vs. CAGLE FOODS JV, LLC, d/b/a Cagle Keystone Foods, CAGLE'S, INC., CAGLE'S FARMS, INC., Defendants.	)	Civil Action File No. 1:01-CV-126-2 (WLS)
MARK A. GLASS and MARK A. GLASS ENTERPRISES, INC., Plaintiffs, vs. CAGLE S, INC., CAGLE S FARMS, INC., and CAGLE FOODS JV, LLC, d/b/a Cagle-Keystone Foods, Defendants.	)	Civil Action File No. 1:01-CV-118-2 (WLS)
TRAVIS MIMS, Plaintiff, vs. CAGLE FOODS JV, LLC, d/b/a Cagle-Keystone Foods, Defendant.	)	Civil Action File No. 1:01-CV-130-2 (WLS)

Deposition of STANLEY I. SAVAGE, Ph.D.

RICHARD E. WHEELER, III, Plaintiff,	)	
vs.	)	Civil Action File No. 1:01-CV-160-4 (WLS)
CAGLE FOODS JV, LLC, d/b/a Cagle-Keystone Foods, Defendant.	)	

Deposition of STANLEY I. SAVAGE. Ph.D., called by the Defendant Cagle Foods JV, LLC, taken pursuant to the Federal Rules of Civil Procedure, was reported by Debbie Paulk Mixon, Certified Court Reporter and Notary Public, at the Wingate Inn, 2735 Dawson Road, Albany, Georgia, commencing at approximately 8:55 a.m. on the 16th day of October 2002 and concluded on the same date.

* * *

[122] can tell you a day before birds get sick, because they can tell you they don't feel good. They can tell you that their activity has changed. And he was that type of person. And he had a son that was like him that was also very similar. Now, whether I mentioned the right Wheeler or not, I don't know. But I do remember that.

Q. Well, this particular Wheeler that you do remember, did he ever complain to you about Cagle Foods, JV, and the treatment he was receiving?

A. Not specifically.

Q. How about generally?

A. I mean, I can't remember a specific. That's what I'm trying to tell you.

Q. Okay.

A. I don't –

Q. I think I'm almost done, if I could just have five minutes. And then we'll wrap it up.

A. Okay.

(A recess was taken.)

(Defendant's Exhibit Savage 2 was marked for identification by the court reporter.)

(A discussion ensued off the record.)

Q. I have a few follow-up questions on just what you've been talking about. Besides the one [123] instance where Mr. Adkins complained about his failure to receive a feed shipment, do you recall any other growers that serviced the Camilla plant complaining about, feed deliveries?

A. Multiple.

Q. Okay, when you say multiple, what are you referring to?

A. They – in order to put the feed out at the plant, the tons of feed required, the feed mill had to run eight days a week full-time. Okay? Anything that stopped the feed from running, be it an ingredient that was not received on time, be it a small breakdown in the plant, in the feed mill, pellet mill, whatever the case, the plant would get behind, the feed mill would get behind.

And I can remember several instances where they had to bring feed down from Macon to this plant because they had growers out of feed. If anything happened that threw

them more than a few hours behind, they had a lot of growers out of feed for hours – one, two, three, four hours isn't a problem. But once a grower has run out of feed in a tank, the sixth hour becomes the critical hour. After that, the grower is in trouble. His birds are losing weight. His birds will lose a feed [124] conversion they'll never, ever get back.

I can remember many complaints from growers at specific county meetings, I was out of feed 12 hours. I was out of feed 6 hours. I remember Lucius – I think Lucius was out of feed 24 hours in some of his houses, the worst house, possibly six hours in another house. And I showed him exactly what he could expect for that grow-out reduction in pay. It was drastic.

I mean, it's just something you just – when you let a grower run out of feed, you have destroyed that grower's pay. And their feed mill was not able – was not designed to make the amount of feed that they needed to make. It had to be redone and redone.

Q. Was that your diagnosis of the problem?

A. Well, when you go to move X tons of feed through a plant and it takes so many minutes to weigh the ingredients, so many minutes to mill the feed, mix the feed, so many minutes to pellet that feed, there are X number of tons that can go through in a given hour. And when you're looking at the fact that you need 28 hours to make a 24-hour day, you're in trouble. And that happened a bunch of times. And this is just inexcusable, because now [125] the whole system of pay falls apart.

Q. In connection with your work for other integrators, did you experience any other similar type problems with the other integrators?

A. That's where we got some data that led to this. Most of the integrators are not an expansion, that they don't expand their feed mill rapidly ahead of growth, because most people realize just what I said, there's so much feed you can put through with particular design, size, and they just don't put out more birds than they can feed. That feed mill just was not designed initially for the number of birds they were – that they ultimately tried to feed.

Q. So you've experienced similar problems or you're aware of similar problems with other integrators?

A. Right, especially when something would break down. A lot of times, it's – like in north Georgia, where you have five or six integrators that are all overlapping, they know how serious the problem is and they'll do anything they can to keep feed to the competitor's birds, because they know the same thing could happen to them.

Q. Okay. Thank you. I don't have any

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS, ET AL., Plaintiffs, v. CAGLE'S INC., ET AL., Defendants.	:	CIVIL ACTION FILE NO. 1:01-CV-126-2(WLS)
MARK A. GLASS, ET AL., Plaintiffs, v. CAGLE S, INC., ET AL., Defendants.	:	CIVIL ACTION FILE NO. 1:01-CV-118-2(WLS)
TRAVIS MIMS, Plaintiff, v. CAGLE FOODS JV, LLC, d/b/a CAGLE-KEYSTONE FOODS, Defendant.	:	CIVIL ACTION FILE NO. 1:01-CV-130-2(WLS)
RICHARD E. WHEELER, III, Plaintiff, v. CAGLE FOODS JV, LLC, d/b/a CAGLE-KEYSTONE FOODS, Defendant.	:	CIVIL ACTION FILE NO. 1:01-CV-160-4(WLS)

AFFIDAVIT OF VIRGIL HODGES

Personally appeared before me, an officer duly authorized to administer an oath, **VIRGIL HODGES**, who, after being duly sworn, states the following:

-1-

My name is Virgil Hodges, and I live in Glen St. Mary, Florida. My telephone number is 904-259-3319. I am of age, competent to make this Affidavit and do so based upon my personal knowledge.

-2-

In September of 1993, I went to work for Cagle Foods JV, LLC as a Feed Mill Manager. I served in the United States Army from 1969 through 1972. Between 1972 and 1990, I worked for Cargill, Inc. in their Jacksonville feed mill starting as an unloader and advancing to feed mill manager for the last six years of my employ there. I worked as a feed mill manager for Hudson Foods, Inc. in Berlin, Maryland between March of 1990 and June of 1992. Immediately prior to my work with Cagle Foods JV, LLC, I had worked as a manufacturing manager and plant manager for International Bakerage, Inc.

-3-

I was employed as the feed mill manager for Cagle Foods JV, LLC from September of 1993 until April 7, 2001.

-4-

In the mid to late 1990's, the Cagle Foods JV, LLC feed mill was unable to produce the volume of feed necessary for the number of houses it had to supply and, as a result, growers were frequently out of feed. This was due to the feed mill being undersized.

-5-

Cagle Foods JV, LLC's managers, Gene Mullins and Donnie Peters, often forced me to create feed credit tickets so as change the weekly settlements. I disagreed on numerous occasions with the feed credits being issued. On occasion, when a grower's feed conversion was not in line with the other growers, they would create a manual charge ticket for feed that no one could prove had been delivered to the farm. These tickets were mailed to the growers. After a while, Gene Mullins and Donnie Peters became frustrated with me and would go directly to the feed dispatch supervisors and ask them to have tickets issued. It was obvious that Donnie and Gene were manipulating the growout settlements to help certain growers and hurt other growers.

-6-

Gene Mullins and Donnie Peters would tell the feed mill employees to send feed to growers who didn't even need feed, while they would let other growers run out.

-7-

Running out of feed during the grow out causes the grower's feed conversion to be poor. Those growers would make less money, and their performance relative to other growers would suffer.

-8-

Cagle Foods JV, LLC normally would not use small eggs from the first few weeks of egg production to hatch broiler chicks because the chicks are too small and do not perform as well on the farm. However, while Lee and Donnie were hatchery managers, they would hatch small eggs when the company was short on eggs. They knew

what farms received these chicks. In addition, Peters knew which growers received chicks from problem breeder farms.

-9-

Cagle Foods JV, LLC managers, Gene Mullins, Donnie Peters, and Buddy Paracca, would have discussions during management meetings during the 1990's and continuing through my term of employment about the activities of the leaders of the growers' association. They referred to Lucius Adkins as "the Godfather". Donnie Peters went to grower meetings and he knew everything that was going on at the meetings.

-10-

The above Cagle Foods JV, LLC managers would also have discussions about pressuring growers who wouldn't sign a contact with arbitration to sign the contract.

-11-

I have had some health problems in the last year. I have been often too weak to travel in the last few months. On several occasions, because of my weakened condition, I have been forced to cancel depositions arranged by Cynthia Noles Johnson and the other attorneys. At times, I am not able to sit up for more than a few minutes at a time or to talk for more than a few minutes.

FURTHER AFFIANT SAITH NOT.

/s/ Virgil Hodges
VIRGIL HODGES

Sworn to and subscribed
Before Me this 21st day
of August, 2003.

/s/ Dede D. Adair
Notary Public

DEDE D. ADAIR
(SEAL) Notary Public
STATE OF GEORGIA
My Commission Exp. 9/17/06

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS, ET AL, **Plaintiffs,** **V.** **CAGLE'S, INC., ET AL,** **Defendants.**	**CIVIL ACTION FILE NO. 1:01-CV-126-2(WLS)**
MARK A. GLASS, ET AL, **Plaintiffs,** **V.** **CAGLE'S, INC., ET AL,** **Defendants.**	**CIVIL ACTION FILE NO.1:01-CV-118-2(WLS)**
TRAVIS MIMS, **Plaintiff,** **V.** **CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS,** **Defendant.**	**CIVIL ACTION FILE NO. 1:01-CV-130-2(WLS)**
RICHARD E. WHEELER, III, **Plaintiff,** **V.** **CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS,** **Defendant.**	**CIVIL ACTION FILE NO. 1:01-CV-160-4(WLS)**

AFFIDAVIT OF BRANDON WOOD

Personally appeared before me, an officer duly authorized to administer an oath, **BRANDON WOOD**, who, after being sworn, states the following:

-1-

My name is Brandon Wood and I live at 110 Courtyard Drive, Thomasville, Georgia 31757. My telephone number is 229-227-6133. I am of age, competent to make this Affidavit and do so based upon my personal knowledge.

-2-

I was employed by Cagle's Farms, Inc. in December of 1992 as a receiver at the feed mill in Camilla, Georgia. As a receiver, my job duties were to receive the feed in ingredients from the suppliers. In 1993, I was promoted to quality control. In May of 1994, I left the company for seven months and returned in December of 1994 and was assigned to fill in for employees who were absent for any reason. I remained in that position until 1996, when I was promoted to feed delivery supervisor. As feed delivery supervisor, I supervised all of the feed truck drivers and three feed dispatchers.

-3-

During the time that I was employed, the company became Cagle Foods and began a big expansion. The feed mill was not able to keep up with the increasing demand for feed. As a result, farms would frequently run out of feed. This problem became worse in the years 1996 and 1997. During this time period, we were keeping a log of growers who called in requesting feed. We were trying to follow the order in which they would run out. On many occasions, Gene Mullins or Donnie Peters would call and tell me to take feed to a grower immediately. That grower would be sent feed out of order.

On many occasions, Donnie and Gene would come out to the feed mill and be quite persistent that the feed accounting was incorrect and demand that feed tickets or credits be created. Donnie and Gene would insist that our records were not right. They would insist that changes be made. On some occasions, Donnie would have calculated in advance how much feed each grower should have and request changes be made. Many of the times when Donnie Peters would insist on making changes, the changes would benefit a grower by the name of Joe Gaines. Donnie seemed to want to make sure that Mr. Gaines did well.

Virgil Hodges, the feed mill manager, and I would argue with Donnie and Gene about the changes that they would want to make. Some times these arguments would go on for days. Donnie and Gene would eventually prevail and get their way.

FURTHER AFFIANT SAITH NOT.

/s/ Brandon Wood
BRANDON WOOD

Sworn to and Subscribed Before Me this
30th day of July, 2003.

/s/ Vanessa Thurmond
Notary Public

[SEAL]

Vanessa Thurmond
Notary Public, Georgia
Whitfield County
My Commission Expires
June 12, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS, ET AL., Plaintiffs, V. CAGLE'S, INC., ET AL., Defendants.	CIVIL ACTION FILE NO. 1:01-CV-126-2(WLS)
MARK A. GLASS, ET AL., Plaintiffs, V. CAGLE'S, INC., ET AL., Defendants.	CIVIL ACTION FILE NO.1:01-CV-118-2(WLS)
TRAVIS MIMS, Plaintiff, V. CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS, Defendant.	CIVIL ACTION FILE NO. 1:01-CV-130-2(WLS)
RICHARD E. WHEELER, III, Plaintiff, V. CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS, Defendant.	CIVIL ACTION FILE NO. 1:01-CV-160-4(WLS)

SUPPLEMENTAL AFFIDAVIT OF BRANDON WOOD

Personally appeared before me, an officer duly authorized by law to administer oaths, BRANDON WOOD, who, after being duly sworn, states the following:

1.

My name is Brandon Wood. I am of legal age, competent to make this Affidavit and do so based on my personal knowledge. I give this Affidavit to supplement and amplify the Affidavit I previously gave on July 30, 2003.

2.

When directing changes which would benefit Mr. Gaines, Donnie Peters and Gene Mullins would suggest that not all of the feed shown on our records as having been delivered to Mr. Gaines' houses had in fact been delivered. While there were occasions when the truck driver would forget to empty the feed from a truck bin, this would be detected and documented on the next occasion the truck was loaded. When suggesting such changes, Donnie and Gene would not provide documentation to establish that feed had not been delivered.

3.

Donnie and Gene would also suggest that not all of the feed which was to have been picked up at the end of a grow out had been recovered from Mr. Gaines. The drivers were instructed to recover all feed at the end of a grow out. On those occasions when Donnie and Gene asked that such changes be made they did not present documentation of unrecovered feed.

4.

From time to time, Donnie and Gene would seek similar changes in the feed records of other growers.

5.

Changes which reduce the amount of feed delivered or increase the amount of feed picked up at the end of a grow out would reduce the amount of feed charged to a grower and therefore be financially beneficial to him.

6.

The changes that Donnie Peters and Gene Mullins wanted to make were not consistent with the records of feed deliveries and pick ups we had kept in the ordinary course of business and they did not present any documentation showing that our records were wrong.

FURTHER AFFIANT SAITH NOT.

/s/ Brandon Wood
BRANDON WOOD

Sworn to and Subscribed Before me this
20th day of August, 2003.

/s/ William A. Erwin
Notary Public

[SEAL]

WILLIAM A. ERWIN
Notary Public,
Dougherty County
My Commission Expires
October 26, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS, ET AL., Plaintiffs, V. CAGLE'S, INC., ET AL., Defendants.	CIVIL ACTION FILE NO. 1:01-CV-126-2(WLS)
MARK A. GLASS, ET AL., Plaintiffs, V. CAGLE'S, INC., ET AL., Defendants.	CIVIL ACTION FILE NO.1:01-CV-118-2(WLS)
TRAVIS MIMS, Plaintiff, V. CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS, Defendant.	CIVIL ACTION FILE NO. 1:01-CV-130-2(WLS)
RICHARD E. WHEELER, III, Plaintiff, V. CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS, Defendant.	CIVIL ACTION FILE NO. 1:01-CV-160-4(WLS)

AFFIDAVIT OF KENNETH CABINESS

Personally appeared before me, an officer duly authorized to administer an oath, **KENNETH CABINESS**, who, after being sworn, states the following:

-1-

My name is Kenneth Cabiness and I live at 215 N. Harney, Camilla, Georgia 31730. My telephone number is 229-336-9345. I am of age, competent to make this Affidavit and do so based upon my personal knowledge.

-2-

I was employed as a chick bus driver by Cagle Foods in Camilla, Georgia in approximately 1996 or 1997. My duties as a chick bus driver included picking up boxes of chicks from the hatchery and delivering them to the broiler farms.

-3-

While working as a chick bus driver, I noticed that most farms would receive chicks from a few (one to three) breeder hen flocks. These chicks would generally be of a uniform size and quality. However, one farmer, Robert Fitzgerald, received chicks from a variety of different breeder flocks. Mr. Fitzgerald often complained about the chick quality.

-4-

There were times when some chick deliveries were changed from one farm to another. I was told that the houses on the scheduled farm were not ready and I needed to take the birds to another farm.

FURTHER AFFIANT SAITH NOT.

/s/ Kenneth E. Cabiness
KENNETH CABINESS

Sworn to and Subscribed Before Me this
30th day of July, 2003.

/s/ Vanessa Thurmond
Notary Public

[SEAL]	Vanessa Thurmond Notary Public, Georgia Whitfield County My Commission Expires June 12, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS, ET AL., Plaintiffs, V. CAGLE'S, INC., ET AL., Defendants.	CIVIL ACTION FILE NO. 1:01-CV-126-2(WLS)
MARK A. GLASS, ET AL., Plaintiffs, V. CAGLE'S, INC., ET AL., Defendants.	CIVIL ACTION FILE NO. 1:01-CV-118-2(WLS)
TRAVIS MIMS, Plaintiff, V. CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS, Defendant.	CIVIL ACTION FILE NO. 1:01-CV-130-29(WLS)
RICHARD E. WHEELER, III, Plaintiff, V. CAGLE FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS, Defendant.	CIVIL ACTION FILE NO. 1:01-CV-160-4(WLS)

AFFIDAVIT OF JOE GAINES

Personally appeared before me, an officer duly authorized to administer an oath, **JOE GAINES**, who, after being sworn, states the following:

-1-

My name is Joe Gaines and I live at 175 Stadium Drive, Camilla, Georgia 31730. My telephone number is 229-336-1404. I am of age, competent to make this Affidavit and do so based upon my personal knowledge.

-2-

Until recently, I was a broiler grower for Cagle Foods, then Equity Group. I built my first four broiler houses in 1993. In 1994, I added two additional broiler houses. Before building my houses, I was told by Mark Fisher and Danny Eiland that I could expect to receive 25,000 birds per house.

-3-

In 1997, I was told by Donnie Peters that the flock numbers would be cut. Many growers were upset about the cuts in placements. I was told by Donnie Peters that I should not be associating with groups of growers.

-4-

For nine years our performance was consistently above average. In the summer of 2002, shortly after Donnie Peters left the company, Scott Shirah and Bobby Land came out to the farm and confronted me with the

interrogatory answers in Mark Glass' case. Scott and Bobby were concerned about some comments I had made about Donnie Peters bringing me good birds. I told them that the comments had been made in a joking manner. However, it is true that the majority of birds I received while Donnie Peters was employed at Cagle Foods were of good quality.

-5-

After my conversation with Scott and Bobby, my performance plummeted. I have been consistently on the bottom for the last six flocks. The company has left my birds in longer than other growers in the same grow-out. This has caused my feed conversion to be poor and decreased my performance.

-6-

In March 2003, my six houses were destroyed by a tornado. On May 30, 2003, I received written notice that my contract was terminated.

FURTHER AFFIANT SAITH NOT.

/s/ Joe Gaines
JOE GAINES

Sworn to and Subscribed
Before Me this 30th day
of July, 2003.

/s/ Vanessa Thurmond
Notary Public

[SEAL] Vanessas Thurmond
Notary Public, Georgia
Whitfield County
My Commission Expires
June 12, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

LUCIUS ADKINS and JILL ADKINS, Plaintiffs, vs. CAGLE FOODS JV, LLC, d/b/a Cagle-Keystone Foods, CAGLE'S, INC., CAGLE'S FARMS, INC., Defendants.	)	Civil Action File No. 1:01-CV-126-2 (WLS)
MARK A. GLASS and MARK A. GLASS ENTERPRISES, INC., Plaintiffs, vs. CAGLE S, INC., CAGLE S FARMS, INC., and CAGLE FOODS JV, LLC, d/b/a Cagle-Keystone Foods, Defendants.	)	Civil Action File No. 1:01-CV-118-2 (WLS)

DEPOSITION OF

SHAUN HALL

* * *

[17] Q. How often would you see Mr. Mullins?

A. He would be in a lot of times by the time I would be leaving, he'd already be in the door and in Virgil's office, because I was leaving at 8:30 in the morning. And he would usually be in the office as I walked on by.

Q. And was that a daily occurrence, that he would come out there? Or how often would you see him?

A. I wouldn't say daily. He was out there often.

Q. And he would be in Virgil's office; is that correct?

A. Uh-huh (positive response). He wouldn't be in my office, anyway. Either Virgil's or Gene's.

Q. Okay. Do you know what they would be talking about?

A. I don't.

Q. Okay. Well, what I'm going to do is play this tape. I just want to play it so that you can identify the Shaun on the tape as being you and not some other Shaun.

A. Okay.

Q. Were there any other Shaun's at the feed mill?

[18] A. I can't place the first one.

Q. Let me play it. And all I need for you to do is listen to it and tell me whether that appears to be your voice on the tape. Okay?

(A discussion ensued off the record.)

TRANSCRIPTION OF CASSETTE TAPE BEGUN

(Voice 1 is represented to be the voice of Shaun Hall, Voice 2 is represented to be the voice of Richard E. Wheeler, III.)

VOICE 1: Feed mill, dispatch.

VOICE 2: Good morning. Who's this?

VOICE 1: This is Shaun.

VOICE 2: Shaun, Rick Wheeler. How's it going, man?

VOICE 1: It's going, slow and steady.

VOICE 2: Well, listen –

VOICE 1: Getting through the day, I guess. One and five?

VOICE 2: That's right.

VOICE 1: All right. All right. We'll work on it.

VOICE 2: All right. When you reckon you'll have it over here? One's basically out.

VOICE 1: Let me see. Who do I have [19] going where? Might be able to get to it in the next hour, hour and a half or so.

VOICE 2: Let me ask you this.

VOICE 1: Yes, sir.

VOICE 2: I'm doing some dirt work back there on the road back around there –

VOICE 1: Yes, sir.

VOICE 2: – between 1 and 5. Is there any way – I know you're in a damn hell of a bind. But is there any way you could bring two loads of feed and put in those houses so when I get through and it rains or something, they ain't got to get back in there for a week or so?

VOICE 1: Well, I can get a load in there here shortly, and then I could try to get one later on.

VOICE 2: Yeah. I mean, the – it's supposed to rain. They're talking about raining tonight or tomorrow.

VOICE 1: Yeah.

VOICE 2: And I'm trying to get it where I can put a culvert in back there where it drains and then smooth that road out for them fellows a little bit. But I'm going to have that road tore up. And if it rains, we're going to have [20] a real bitch.

VOICE 1: Well, I'll try what I can. And –

VOICE 2: I mean, I realize you're in a bind. But if you can do it, it would help both of us –

VOICE 1: All right. Well, let me see what I –

VOICE 2: – in the end, because I don't need to pay a wrecker bill and y'all don't need a truck stuck. But I've got to do – I've got to do some work on that road. And anything I do back there is – and if it rains, it's going to make it slick.

VOICE 1: All right. Well, let me work on it and see what I can get accomplished with it.

VOICE 2: All right. I appreciate it. I mean, I hate to ask it of you, because I know y'all are behind like hell. But –

VOICE 1: Well, people that don't even need it are getting these double loads, anyway. Just depends on who you are and how much you bother Gene Mullins. But I didn't say that.

VOICE 2: Well, maybe I need to start [21] ringing his number a little more regular, then.

VOICE 1: It would help you a lot. But I didn't tell you that, either. All right, Mr. Wheeler. You have a good day.

VOICE 2: I'm gonna try.

VOICE 1: All right.

VOICE 2: Buy.

TRANSCRIPTION OF CASSETTE TAPE CONCLUDED

Q. Was that you, Shaun?

A. Yes, ma'am.

Q. Do you recall that conversation?

A. Specifically, no, ma'am.

Q. All right. I'm done.

A. Okay.

Q. That's it.

A. All right.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

KATHRYN D. SPELL, RICHARD E. WHEELER, III, BILLIE SUE LOTT, INDIVIDUALLY AND AS CLASS REPRESENTATIVES FOR ALL GROWERS SIMILARLY SITUATED,	:	
Plaintiffs,	:	**CIVIL ACTION FILE NO. 4:99-CV 0136-HLM**
v.	:	
CAGLE'S, INC., CAGLE'S FARMS, INC., CAGLE'S FOODS JV, LLC d/b/a CAGLE-KEYSTONE FOODS JV, LLC,	:	
Defendants.	:	

AFFIDAVIT OF BENNIE MORRIS

Personally appeared before me, an officer duly authorized to administer an oath, **BENNIE MORRIS,** who, after being sworn, states the following:

-1-

My name is Bennie Morris. I reside at 5571 Raye Ridge Road, Camilla, Georgia. I am of age, competent to make this Affidavit and do so based upon my personal knowledge.

-2-

I worked at the Cagle's, Inc./Cagle Foods (Cagle's) poultry processing plants in Camilla, Georgia from approximately 1987 until June of 1996. I worked at the old

plant until the new plant opened in 1995. I worked for four different security firms at the Cagle's plants: Burns International, Globe Security, Wells Fargo Guard Services, Inc., and DSI, Inc.

-3-

While I was employed with the above security agencies, I worked at the live poultry scales and also supervised the weighers of live poultry while employed for Burns, Wells Fargo, and DSI).

-4-

During the entire time I was employed to work at the Cagle's plants, I observed many practices which would have unfairly decreased the gross weight of live poultry for which Cagle's growers were paid.

-5-

During the entire time that I worked at Cagle's, until just shortly before I left in 1996, Cagle's would frequently use different tractors to take gross weight than the tractor used to take the tare weight of live haul trailers. The tractors weighed different amounts, and the growers whose birds were weighed using different tractors to take tare and gross weights would receive inaccurate weights.

-6-

On many occasions, the tare weight would be taken with an over-the-road tractor and the gross weight would be taken with a yard dog. The yard dog weighed between 2,000 to 3,000 pounds less than over-the-road tractors.

-7-

On many occasions, the tare weight would be taken with several people sitting in the truck (catch crew and forklift drivers) and the gross weight would be taken with just the driver in the truck.

-8-

On many occasions, the plant would be backed up (there would be too many loads of birds waiting to be processed) and truck drivers would be told to hold loads of birds on the farm, or to drive up and down the road with the loaded trucks before coming to the plant.

-9-

At the old plant prior to 1995, the tare weight would be taken with a full gas tank and the gross weight would be taken with the gas tank less than full.

-10-

In the late 1980's, until right before the old plant was shut down, live poultry that came in at night would not be weighed until 4 o'clock a.m. or thereafter. The trailers loaded with poultry would sit for long periods before being weighed.

-11-

All of these practices happened so frequently that all of Cagle's growers would have been affected.

FURTHER AFFIANT SAITH NOT.

/s/ Bennie Morris Jr.
BENNIE MORRIS

Sworn to and Subscribed Before Me this
31st day of March, 2000.

/s/ Cynthia Noles Johnson
Notary Public

No. 05-426

In the Supreme Court of the United States

MARK A. GLASS AND
MARK A. GLASS ENTERPRISES, INC., ET AL.

Petitioners,

v.

CAGLE FOODS JV, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HOWARD A. ROSENTHAL
Counsel of Record
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MALCOLM S. GOULD
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Counsel for Respondent

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QUESTIONS PRESENTED.

I. Whether certiorari should be denied when the petition raises questions of law concerning the application and construction of the Packers and Stockyards Act which were neither raised before nor decided by the courts below and which were not relevant to the grant of summary judgment against petitioners by the District Court, as upheld by four separate panels of the Court of Appeals, due to petitioners' inability to present any facts in support of their claims, whatever legal standard was applied?

II. Whether certiorari should be granted solely to review concurrent findings of fact by the District Court and the Court of Appeals in the absence of any obvious and exceptional showing of error?

RULE 29.6

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Cagle Foods JV, LLC (now called Equity Group - Georgia Division, LLC) discloses that its sole member is Grow-Out Holdings LLC, which is affiliated with Keystone Foods LLC, both of which are privately held Delaware limited liability companies. No publicly held company owns 10% or more of the interests of any of the limited liability companies.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

COUNTER-STATEMENT OF THE CASE.

> In a surprisingly large number of cases every year, the petition raises questions that were not decided by the court below because they were not raised, or seriously mischaracterizes the holding of the court. Demonstration of such a defect is ordinarily fatal to the petition.

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 6.37(c), at 459-60 (8th ed. 2002).

Here, as suggested above, petitioners have seriously mischaracterized the holdings below, describing the four underlying cases in a manner that bears no resemblance to the cases presented to the courts below nor the decisions rendered by those courts. Most critically, contrary to petitioners' suggestion, none of those decisions, at any level, expressly or otherwise, involved any questions of law pertaining to the application or interpretation of the Packers and Stockyards Act ("PSA"). The sole basis for the decisions of the District Court and four separate panels of the Court of Appeals for the Eleventh Circuit was petitioners' utter failure to produce any facts in support of any of their claims. Pursuant to Supreme Court Rule 15.2, which admonishes that it is counsel's obligation to identify in the brief in opposition to a petition for a writ of certiorari, and not later, any misstatements of fact or law "that bear on what issues would properly be before the Court if certiorari were granted," respondent provides this counter-statement of the case.[1]

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[1] This Counter-Statement is annotated to the Appendix ("App.") filed with the Court by petitioners, which principally includes the opinions of the courts below. Those decisions are well supported by an extensive factual record, including petitioners' own admissions at their depositions. Any additional support is referenced to the District Court records.

A. The Parties.

Respondent Cagle Foods JV, LLC ("Cagle JV"), is a fully integrated poultry processor with operations located principally in Camilla, Georgia, where it produces a significant portion of the daily chicken meat requirements for McDonald's Restaurants. Cagle JV's operation is composed of a slaughtering plant and processing facility, a feed mill, a hatchery and over 100 independent contract farming facilities, including these four petitioners. [App. 40-1.] None of the other broiler growers filed, or joined in, any suit against Cagle JV.

The broiler growers provide the poultry houses and labor to raise the birds for slaughter. Cagle JV maintains ownership of the chickens and provides the broiler growers with feed, medication and technical support services. [App. 42.] At the end of the "grow-out," Cagle JV catches and transports the birds to its processing plant, weighs the truck full of birds, deducts the weight of the crates and the truck and determines the weight of the broiler birds. The grower is compensated based upon the weight of the birds, adjusted by a formula that compares that grower's cost per pound against similarly situated growers during the same time period. [App. 27.] The primary goal of Cagle JV's contract grower operation is to produce a sufficient number of birds (in order to process approximately 250,000 per day) with the maximum meat possible. Any problems in the supply chain – poor egg production, disease or high mortality at the growers' farms – significantly impacts Cagle JV's ability to provide poultry products to its customer. [App. 42.] Thus, any suggestion that Cagle JV would deliberately harm production, even if it could do so, is counter-intuitive, as noted by the District Court below. [App. 58, 77, 119.]

Petitioner Mark A. Glass ("Glass") has been a contract broiler grower for Cagle JV since 1994 and continues to do

business with Cagle JV. During this period, Glass *expanded* his poultry operations on three separate occasions. Glass currently owns two separate poultry farms and manages his father-in-law's farm. [App. 46.]

Petitioners Lucius and Jill Adkins ("Adkins") entered the poultry growing business in 1991 and, thereafter, twice *expanded* their operations while contracting with Cagle JV. The Adkins continue to grow poultry for Cagle JV on two poultry farms. [App. 13.]

Petitioner Richard E. Wheeler, III ("Wheeler"), has been a contract broiler grower for Cagle JV since 1994 and continues to do business with Cagle JV. [App. 66.]

Petitioner Travis Mims ("Mims") commenced growing broilers for Cagle JV in 1994. [App. 28.] In the fall of 2000, Mims advised Cagle JV that he had decided to get out of the poultry growing business. Although he later changed his mind, and received more birds to raise, Mims filed for bankruptcy in 2001. [App. 29, 108-9.]

B. Petitioners' Poultry Operations.[2]

Each of the petitioners periodically signed Broiler Production Agreements which set forth Cagle JV's obligations to provide the birds, feed, medication and technical assistance. The Agreements also set forth the pay

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[2] Where appropriate, references to the summary judgment record before the District Court in the four separate cases will be indicated by the grower name, and the applicable tab number and page reference of the Appendix in Support of the Motion for Summary Judgment (MSJ App., Tab ___), as filed with the United States District Court for the Middle District of Georgia, as follows:

Adkins	Civil Action No. 1:01-CV-126-2
Mims	Civil Action No. 1:01-CV-130-2
Glass	Civil Action No. 1:01-CV-118-2
Wheeler	Civil Action No. 1:01-CV-160-4

schedule (the amount paid per pound per bird) for the duration of the Agreements, which amount was periodically increased. [App. 14, 47, 85.] None of the contracts referred to the specific number of birds to be placed in each house nor the number of flocks to be placed per year. All of these contracts contained a merger clause confirming that the agreements superseded all prior negotiations, representations or agreements. [App. 85-6.]

Despite their present claims, neither Glass, Wheeler nor Mims ever noted or otherwise complained about receiving poor quality chicks, nor did they otherwise document any deficiencies. [App. 48, 71, 113.] Out of over 77 deliveries of birds since 1992, the Adkins noted problems on only seven occasions, but those flocks admittedly performed well. [App. 90, 96.] Glass admitted that any "undocumented" bird quality problems he experienced were no different than what other growers experienced. [App. 48.] Indeed, "Cagle JV produced clear and unrefuted evidence that [given the large number of birds placed on a daily basis – over 250,000] it is virtually impossible for Cagle JV to target specific farms for delivery of inferior birds." [App. 52.]

Likewise, *none* of the petitioners could identify any instance where he or she was shorted feed or was given insufficient or inferior feed. [App. 48, 71, 91, 113.] Contrary to petitioners' statement that they ran out of feed almost every flock [Petition at 15], no such evidence exists and the District Court's determination with respect to Glass is equally applicable to all petitioners:

> Glass ... claims that he experienced feed problems. However, he cannot point to any particular instance that he was shorted feed or suffered other feed problems. In addition, he never documented any such problems. Likewise, Glass claims he experienced feed

> accounting problems, but as with his other problems he cannot point to any specific instances where he was shorted feed or overcharged.

[App. 48.]

Similarly, notwithstanding their allegations about Cagle JV's weighing procedures, *none* of the petitioners was able to identify a single instance where their birds were misweighed. [App. 55, 74, 91, 100.] Although each of the petitioners relied upon the testimony of Bennie Morris, a security guard in charge of weighing at the old and new Camilla processing plants through 1997 only, to support their allegations of misweighing [App. 53, 72, 91, 113-14], Morris himself "clearly states that the weighing discrepancies virtually ended" *in 1987* when Cagle's, Inc., hired a new controller to oversee the weighing process, that is, years before any of the petitioners contracted with Cagle JV and, indeed, even prior to Cagle JV's 1993 formation. [*Id.*] The District Court's determination with respect to Mims is again equally applicable to all petitioners: "[o]f the many loads of chickens produced by ... Mims and weighed by Cagle JV, [he has] not pointed to any specific instances where his chickens were not weighed properly." [App. 110.] Moreover, as none of the actions below was a class action, "[e]ven if Plaintiffs' interpretation of Morris' testimony were true, ... Mims cannot point to a specific incident during which [his] birds were misweighed." [App. 114.]

In May of 1999, Cagle JV offered to all growers an *optional* form of contract containing an "arbitration clause" and a higher payment rate. The growers were advised that they would remain growers for Cagle JV whether or not they accepted the *optional* arbitration contract. Each of the petitioners rejected the new contract, but each continued to grow poultry for Cagle JV. [App. 49, 68, 87-8, 115.] Again, the District Court's determinations as to the Adkins is applicable to all petitioners – "there is no evidence of any

systematic attempt ... to force the Adkins to sign the arbitration contract" [App. 22-23] and "[t]he Adkins can point to no evidence that they received inferior birds for refusing to accept the arbitration contract." [App. 88.] Contrary to petitioners' present fabrications, the Adkins' gross income at both of their farms *increased* after 1999 despite their refusal of the arbitration contract. [*Adkins*, Memorandum of Law in Support of Motion for Summary Judgment, Exs. "A" and "B."] The other petitioners' experiences were similar.

Each of the petitioners joined the United Poultry Growers' Association ("UPGA") in the mid to late 1990s, and Glass and Lucius Adkins became officers of the organization. [App. 49, 68, 87, 110.] Although each petitioner attended meetings of the UPGA, which were open to anyone, including Cagle JV, there was no direct, empirical or circumstantial evidence that petitioners' association with, or activities on behalf of, the UPGA in any way affected their business relationship with Cagle JV. Glass "presented no evidence that Cagle [JV] or its agents discriminated against him for organizing or participating in a poultry organization," nor did he "present any evidence of retaliation." [App. 4.] Similarly, "Wheeler presented no evidence that Cagle Foods or its agents interfered with his attempt to organize and participate in a grower or poultry association or discriminated against him for such participation," nor did he "present any evidence of retaliation." [App. 9.] "The Adkins ... produced no evidence that any employee of Cagle JV ever harassed them regarding their efforts to organize and participate in a growers' association," "[n]or did [they] put forth significant evidence of discrimination." [App. 22.] Mims "failed to produce evidence ... creating a genuine issue of material fact that Cagle [JV] discriminated, coerced, or intimidated him

with respect to his membership in a growers' association."[3] [App. 38.]

C. The Decisions Below.

In 2001, each of the petitioners commenced separate actions in the United States District Court for the Middle District of Georgia against Cagle JV asserting: claims under the Packers and Stockyards Act, 7 U.S.C.A. §§ 181-231 ("PSA"); fraud; violation of Georgia's Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. §§ 16-14-1, *et seq.*; fraud in the inducement/promissory estoppel; breach of contract; and for violation of the Agricultural Fair Practices Act, 7 U.S.C.A. § 2301-2306 ("AFPA"). The parties engaged in massive discovery over several years, involving numerous depositions and the exchange of thousands of pages of documents. Discovery in the four cases was consolidated. In August and September, 2003, Cagle JV filed Motions for Summary Judgment in each petitioner's case.

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[3] Despite the false allegations in the Petition, Jill Adkins admitted that the Adkins' farms' performance *improved* while they remained active in the UPGA [*Adkins*, MSJ App., Tab 8 at 66-7] and Glass performed better and achieved his highest revenue after he became an officer in the UPGA and after his December, 1998 meeting with Doug Cagle where he was allegedly "threatened" for speaking ill of Cagle. [*Glass*, Memorandum of Law in Support of Motion for Summary Judgment, Exs. "A" and "B."] Wheeler's overall rank as a grower – consistently below average throughout his tenure – actually *rose* in 1999 after he became involved in the UPGA and rejected the arbitration contract. [*Glass*, MSJ App., Tab 128.] Even as to the meeting with Cagle, Glass admitted that the focus was on "legitimate business concerns" and that Cagle JV's local management assured Glass that "he wanted the growers to be happy and make money and that he would do everything to make sure that happened." [App. 50.] Glass and Cagle exchanged pleasantries and thanked each other when leaving the meeting. [*Id.*] Glass also testified "that he was not harassed by Cagle JV ... for participating in the association." [*Id.* at 60.] Lucius Adkins, who also met with Cagle, admitted that no threatening remarks were made at the meeting, which he described as "a rather nice visit." [*Adkins*, MSJ App., Tab 5 at 175-6.]

After a painstaking review of the voluminous factual record presented to it, the District Court granted Cagle JV's Motions for Summary Judgment by Orders dated March 24, 2004 (Adkins)[App. 81-100], March 26, 2004 (Mims)[App. 101-122], September 28, 2004 (Wheeler)[App. 62-80] and September 29, 2004 (Glass)[App. 40-61]. Without discussion of any legal issues or standards, the District Court concluded that petitioners had not established any facts in support of any of their claims sufficient to withstand summary judgment. As to petitioners' PSA claims, the District Court pointedly noted the lack of *factual* support but demonstrated its thorough review and grasp of the record before it:

> • Glass has produced *no evidence* that he received a substantial number of bad birds, much less that Cagle JV intentionally provided him with bad birds. * * * *Glass cannot identify any instance* where he was charged for feed that he did not receive.

[App. 52-53 (emphasis added).]

> • With respect to misweighing: *Glass* "has *failed to provide any admissible evidence* that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof."

[App. 55 (emphasis added).]

* * *

> • *Wheeler* has produced *no evidence* that he received a substantial number of bad birds, much less that Cagle JV intentionally provided him with bad birds. * * * *Wheeler cannot identify any*

instance where he was charged for feed that he did not receive.

[App. 71 *(emphasis added).*]

- With respect to misweighing: *Wheeler* "has *failed to provide any admissible evidence* that Cagle JV engaged in any of the fraudulent conduct alleged, much less suffered any damages on account thereof."

[App. 74 (emphasis added).]

* * *

- The *Adkins* have produced *no evidence* that they received a substantial number of bad birds, much less that Cagle JV intentionally provided them with bad birds.

[App. 90 (emphasis added).]

- As to their claims of receiving insufficient or inferior feed, *neither Jill nor Lucius could point to any specific instances.* In fact, Jill stated that all growers had problems with feed delivery from time to time.

[App. 91 (emphasis added).]

- [T]he *Adkins cannot point to a specific incident* during which their birds were misweighed.

[App. 92 (emphasis added).]

* * *

- ...*Mims* ... produced *no evidence* that [he] received a substantial number of

> bad birds, much less that Cagle JV intentionally provided [him] with bad birds.... Mims *never noted ... alleged deficiencies* on the Chick Delivery Reports *or kept any records documenting such deficiencies.*

[App. 113 (emphasis added).]

> • As to [his] claims of receiving insufficient or inferior feed, ... *Mims identified only three instances* during the seven years [he] grew chickens when Cagle JV failed to timely deliver feed or to pick up [his] birds. The feed delay was the result of the feed mill breaking down. The delay in picking up the birds was the result of bomb threats at the Camilla plant and a lightning strike.

[App. 113 (emphasis added).]

> • ... *Mims cannot point to a specific incident* during which [his] birds were misweighed.

[App. 114 (emphasis added).]

In contrast to petitioners' now strident fabrications in filing their consolidated Petition for Writ of Certiorari ("Petition") with this Court, even the most cursory review of the District Court's decisions reveals that its disposition of petitioners' PSA claims involved *no* legal issue, including the need *vel non* of competitive injury under the PSA or any other issue of interpretation or construction of that statute. The District Court's sole grounds for disposition of each petitioner's PSA claim – as all their claims – was the complete lack of evidence supporting their allegations as well as petitioners' admissions of lack of evidence.

Petitioners' separate *de novo* appeals to the Court of Appeals for the Eleventh Circuit were heard by four separate panels, and premised *solely* on the District Court's alleged failure to properly evaluate petitioners' "evidence." Contrary to petitioners' present Petition, *no* issue regarding interstate commerce and the attendant requirement that alleged PSA violations affect competition, as may have been presented in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005)("*London*"), *petition for cert. filed*, No. 05-411 (September 28, 2005), was implicated or even raised by petitioners in any of the four appeals.[4] For that reason alone, this Petition should be rejected.

By Orders dated April 5, 2005 (Glass), June 8, 2005 (Wheeler), June 13, 2005 (Adkins) and June 15, 2005 (Mims), four separate panels, comprised of ten different judges of the Eleventh Circuit, affirmed, in full, each judgment entered by the District Court.[5] With respect to petitioners' PSA claims, each of these four separate panels of the Eleventh Circuit concluded that the District Court's *factual* determinations were proper and affirmed the grant of summary judgment against petitioners:

> • The *Adkins have alleged* that Cagle JV violated [the PSA] when it (1) provided them with inferior birds, (2) provided them with inferior or insufficient feed, (3) improperly weighed birds they had raised, and (4) offered them an unfair

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[4] *London* is currently before this Court, a Petition for Writ of Certiorari having been filed on September 28, 2005 and docketed at No. 05-411. The legal issue presented in *London* – effect on competition – is not relevant to any of the cases consolidated as part of this Petition.

[5] Glass filed a motion for rehearing en banc which was denied by the Eleventh Circuit on June 1, 2005, "*no* Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc...." [App. 124 (emphasis added).]

arbitration contract. * * * *We do not decide whether these factual allegations, if proved, would establish a violation of the PSA.* For the present case, it is sufficient for us to hold *that the district court was correct in finding that the Adkins did not prove their allegations*, and that the few facts they did produce were clearly insufficient to make out a PSA claim.

[App. 17 and n.7 (emphasis added).]

* * *

- *Glass's PSA claim fails.* Although Glass argues that Cagle Foods violated the PSA by providing him with inferior birds and feed, and improperly weighing birds, *Glass presented no admissible evidence to support these arguments.* Glass also erroneously argues that the offer by Cagle Foods of a raise in exchange for signing an arbitration contract violates the PSA. As explained by the district court, the arbitration contracts did not violate the PSA because the contracts were offered to all growers. *The district court properly granted summary judgment on Glass's PSA claim.*

[App. 2-3 (emphasis added).]

* * *

- *Wheeler's PSA claim fails.* The PSA prohibits 'unfair, unjustly discriminatory, or deceptive practices or devices,' or 'any undue or unreasonable

performance or advantage.' 7 U.S.C. §§ 192(a) and (b). Although Wheeler argues that Cagle Foods violated the PSA by providing him with inferior birds and feed and improperly weighing birds, *Wheeler presented no admissible evidence to support these arguments.*

[App. 7 (emphasis added).]

* * *

- We conclude that the district court properly found that *Mims lacked sufficient evidence to support his PSA claim.*

[App. 30 n.2 (emphasis added).]

- [W]e conclude that *Mims has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual [PSA] allegations.*

[App. 31 (emphasis added).]

In addition to the PSA claims, the judgments below disposed of *all* of petitioners' claims and for the same reason – *lack of supporting evidence.* For example, with respect to Wheeler, the Eleventh Circuit held:

- Wheeler's fraud and Georgia RICO claims fail for the same reason his PSA claim fails: *he did not present any admissible evidence that Cagle Foods engaged in the conduct alleged.*

[App. 8 (emphasis added).]

- Wheeler's fraud in the inducement claim also fails because he did not

establish the elements of the cause of action.

[*Id.*]

- Wheeler's AFPA claim fails because Wheeler *presented no evidence* that Cagle Foods or its agents interfered with his attempt to organize and participate in a grower or poultry association or discriminated against him for such participation.... *Wheeler did not present any evidence of retaliation.*

[App. 9 (emphasis added).]

- Finally, Wheeler's breach of contract claim fails because the *undisputed evidence* shows that Cagle Foods did not breach the grower contracts with Wheeler....

[*Id.* (emphasis added).]

Separate panels of the Eleventh Circuit independently reached similar holdings with respect to Glass, the Adkins and Mims on their separate appeals. [App. 3-4, 19-23, 35-8.]

In sum, four separate panels of the Eleventh Circuit (and the entire Eleventh Circuit as to *Glass*) reviewed the extensive factual records *de novo* and held that petitioners presented no admissible evidence to factually support *any* of their claims, *whatever the applicable law*. The issues raised in *London* concerning the scope of the PSA were irrelevant to that review and the resulting decisions.[6] In

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[6] Petitioners' reference to Cagle JV's request for attorneys' fees below, exactly as Congress declared that it was entitled to seek under the AFPA's attorneys' fee provision, 7 U.S.C. § 2305(c)(1), is yet another act of desperation. The exercise of its statutory rights can hardly be declared

fact, petitioners do not argue that any of the four Eleventh Circuit decisions in this case are "in conflict with the decision of another United States court of appeals on the same important matter"; *or* that any of those decisions were decided in a manner that conflicts with a decision by a state court of last resort. *See* Supreme Court Rule 10(a). *Nor* can petitioners seriously suggest that those decisions, upon review of a factual record with a dearth of facts supporting petitioners' distorted view of this industry, "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power...." *Id.*

REASONS FOR DENYING THE PETITION.

I. Neither The Record Nor The Decisions Below Raise The Question Presented In *London v. Fieldale Farms Corporation.*

In light of the nature of the record below, petitioners' reference to *London* is without substance but consistent with petitioners' complete lack of candor with the judicial system at all levels, as Cagle JV has repeatedly and successfully demonstrated. Whether misstating the record facts below, or now the legal issues, petitioners continue their campaign of deception. Quite simply, petitioners can establish no basis for any consideration of this appeal, especially for any "compelling reasons," as required by Supreme Court Rule 10.

Although irrelevant to any issue here, the sole question presented for review in the Petition for a Writ of Certiorari filed in *London* ("*London* Petition") is "*whether*

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to be an effort "to deter growers from seeking redress." [*See* Petition at 18.] Fee shifting under the AFPA was endorsed by Congress and petitioners should have been aware of that possibility upon filing these cases.

the PSA prohibits *any* unfair, unjustly discriminatory, or deceptive practices *or only those that have an anticompetitive effect*." [*London* Petition at 6 (emphasis added).] Stated differently, the issue raised in *London* is "whether the PSA requires a showing of competitive injury...," allegedly the subject of a conflict among various federal circuit courts of appeal, and presents a pure question of law to be resolved through textual analysis of the statute and the legislative history of the PSA. [*Id.* at 22-3.]

This Petition, and the four cases below at both the District Court and the Court of Appeals, involve *none* of these elements, nor were the issues raised in *London* even raised by these four petitioners. Yet, in an effort to save this baseless litigation (but without any analysis of the multiple decisions below), petitioners, now for the first time, "adopt and rely upon the petition in *London*" and suggest "that its resolution should result in an order of remand for review of each of their cases by the Eleventh Circuit Court of Appeals using the proper interpretation of 'unfair' and 'unjustly discriminatory'." [Petition at 14.] However, "close proximity" of these decisions in time, as suggested by petitioners [*see* Petition at 5], is hardly a relevant basis to suggest a legally significant relationship or any basis for this Petition. In fact, these cases did not implicate the pending *London* Petition, or the legal issue raised in *London*, in any way and the attempt to bootstrap these cases to *London* is disingenuous. As such, there can be no basis to defer the denial of the Petition here, even if the *London* Petition were granted.

In *London*, a jury determined that termination of plaintiffs' poultry grower contract "was without economic justification and violated the PSA...." The district court granted defendant's motion for judgment as a matter of law on grounds that plaintiffs presented no evidence as to the competitive effects of their termination. [*London* Petition

at 3 and 25a-26a.] In contrast, and as set forth in detail *supra*, petitioners' PSA claims here – as all of their claims – failed due to petitioners' threshold failure to produce *any* admissible evidence supporting their allegations of harm sufficient to withstand summary judgment and not due to any legal issue, especially the issues regarding competitive injury raised in *London*. Accordingly, as the Eleventh Circuit determined (*in multiple panel decisions involving ten individual judges*), "the Adkins did not prove their allegations" [App. 17 n.7]; "Mims lacked sufficient evidence to support his PSA claim" and "has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual [PSA] allegations" [App. 30 n.2, 31]; and Glass and Wheeler "presented no admissible evidence to support these [factual] arguments." [App. 2, 7.] That the decisions below turned *solely* on petitioners' failure to make the threshold *factual* showing sufficient to withstand summary judgment – and *not* on any legal standard for a PSA violation – was made explicit by the Eleventh Circuit. For example, with respect to the Adkins' PSA claim, the Eleventh Circuit, after summarizing the factual allegations (inferior birds and feed, misweighing, *etc.*) and reviewing the record, explained that, in affirming summary judgment, it need *not* determine any legal issue or standard regarding the application of the PSA:

> *We do not decide whether these factual allegations, if proved, would establish a violation of the PSA.* For the present case, it is sufficient for us to hold that the district court was correct in finding that *the Adkins did not prove their allegations*, and that the few facts they did produce were clearly insufficient to make out a PSA claim.

[App. 17, n.7 (emphasis added).]

Similarly, with respect to Mims, while the Eleventh Circuit referenced *London* and its holding that a showing of

anticompetitive effect is necessary to sustain a PSA claim, the Court made clear again that it did not need to determine that legal issue in sustaining summary judgment:

> We assume *arguendo* that Mims is entitled to a jury on his PSA claim if he could produce evidence sufficient to raise a genuine issue with respect to *any* of his factual allegations. However, we conclude that *Mims has not produced sufficient evidence* such that a rational juror could find in his favor on *any* of these factual allegations.

[App. 31 (emphasis added).]

The decisions below clearly resulted from an intensive *factual* analysis of the records in each of four cases. There was no legal issue presented *or even argued* by petitioners based on *London* – as such, a decision in *London*, even if certiorari is granted in that case, could have no impact here, as competition and competitive injury were not issues in these petitioners' cases.[7] The outcome below in each petitioner's case was *fact driven* – none of the petitioners presented any facts sufficient to withstand summary judgment, as all of the lower courts consistently concluded. To suggest otherwise, and seek relief from this Court based on the *London* Petition (in light of this Court's Rules), evidences a lack of understanding of those decisions, devious misrepresentation to the extreme, or complete desperation. Despite petitioners' baseless (if not fabricated)

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[7] Likewise, *Pickett v. Tyson Fresh Meats, Inc.*, Dkt. No. 04-12137 (11th Cir., August 16, 2005), a subsequent decision by the Eleventh Circuit, offers no support for petitioners here. [*See* Petition at 5-6.] That case, which dealt with the validity of "marketing agreements" in the meat-packing industry, relied on *London*, but not *Adkins* (which merely acknowledged the *London* decision), as the *legal* standard for a PSA violation – a standard which has no application here as the decisions below were premised totally on the dearth of supporting facts.

pleas, neither the record nor the decisions below raise the question presented in *London* – there can be no basis to defer these cases until a decision in *London*. This Petition should be denied now, without reference to any outcome in *London*. Cagle JV is entitled to end petitioners' legal war of attrition now.

II. The Eleventh Circuit's Decisions Were Premised Solely On The Lack Of Supporting Threshold Facts To Sustain Petitioners' PSA Claims And Not On Any Legal Interpretation Of The PSA Requiring "Intentional Rather Than Negligent" Conduct.

In recognition that their *London* argument is fallacious, petitioners proceed with their equally flawed assertion that the Eleventh Circuit somehow "interpreted" the language of the PSA to deny petitioners its protections. Thus, petitioners argue that the Eleventh Circuit, "[b]y requiring proof of discriminatory intent ... misapplied the plain language of the PSA's prohibition against *any unfair practice*" and "improperly imposed upon the Petitioners a burden to show ... intentional, rather than negligent" conduct. [Petition at 15-16.] Petitioners' argument doubly runs afoul of the record and the Eleventh Circuit's decisions since it (a) assumes that sufficient evidence of *any* "unfair practices" was produced, which was not, and (b) assumes that the Court imposed a requirement of intentional conduct to support a PSA claim, which it did not.

To support this fallacious argument, petitioners first posit the existence of "undisputed evidence" that they were given "poor quality and sick birds" and, incredibly, that they "ran out of feed almost *every flock*." [Petition at 14-15.] These assertions are untenable in face of the clear evidence of record and petitioners' admissions, as summarized correctly by the Eleventh Circuit: "Glass presented no

admissible evidence to support these arguments" [App. 2]; "Wheeler presented no admissible evidence to support these arguments" [App. 7]; "the Adkins did not prove their allegations" [App. 17, n.7]; and "Mims has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual allegations." [App. 31.]

Moreover, in affirming the decisions of the District Court, despite petitioners' false assertions to the contrary, the Eleventh Circuit *expressly* did *not* impose a requirement of intentional conduct. Indeed, that the Eleventh Circuit was not even presented any issue of "intentional rather than negligent" conduct under the PSA is amply confirmed by its clear holding as to Mims, which is equally applicable to *all* petitioners and bears repeating:

> We assume *arguendo* that Mims is entitled to a jury on his PSA claim if he could produce evidence sufficient to raise a genuine issue with respect to any of his factual allegations. However, we conclude that Mims has not produced sufficient evidence such that a rational juror could find in his favor on any of these factual allegations.

[App. 31.][8]

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[8] The very Appendix cites referenced by petitioners [Petition at 14] destroy their argument that the Eleventh Circuit required a showing of intentional conduct. *Glass*: "Glass presented no admissible evidence to support these arguments." [App. 2.] *Wheeler*: "Moreover, we agree with the district court that [Cagle JV] produced 'unrefuted evidence that it is virtually impossible for Cagle [JV] to target specific farms for delivery of inferior birds.' As to his complaint of insufficient and inferior feed, Wheeler did not identify one instance where he was charged for feed he did not receive, and he admitted that he consistently checked his feed inventory to verify feed deliveries. As to his complaint about improper weighing of birds, we agree with the district court that a reasonable reading of the evidence attributes any improper weighing to 'sporadic failures of drivers to follow the rules or problems causing the plant to shut down temporarily,' none of which violated the PSA. Moreover, the deposition testimony on which Wheeler relies shows that other weighing

Likewise, in finding *no evidence* of *any* conduct violative of the PSA, the District Court, as to each petitioner, also determined that there was *no* proof of *intentional* conduct:

> Glass [Wheeler, Adkins, Mims] produced *no evidence* that he received a substantial number of bad birds, *much less* that Cagle JV *intentionally provided* him with bad birds.

[App. 52, 71, 90, 113 (emphasis added).]

Where there is no evidence of *any* "bad" conduct, there can be no "intentional" bad conduct. Petitioners' assertion that the Eleventh Circuit "improperly imposed upon the Petitioners a burden to show ... intentional, rather than negligent" conduct under the PSA [Petition at 16] is demonstrably false, and this Petition should be denied.

III. All Of Petitioners' Arguments Are Premised On Alleged Erroneous Factual Findings, An Insufficient Ground For Granting Certiorari.

Petitioners' final argument that "[t]he Eleventh Circuit ignored the standard for review of summary judgment" simply reflects petitioners' disagreement with the factual findings of the courts below. [*See* Petition at 18: "In affirming summary judgment ... the Eleventh Circuit made the same error as did the district court. The court drew all inferences from the disputed facts in favor of Cagle Foods."] Indeed, petitioners' disagreement with the factual findings below permeates their entire present Petition. As

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discrepancies ended several years before Wheeler became a grower." [App. 7-8.] *Adkins*: "There is no evidence that the Adkins received a substantial number of inferior birds. ... [T]he Adkins cannot identify any instances where Cagle JV misweighed their birds after 1995." [App. 17-8.]

such, for that reason alone this Petition for Writ of Certiorari must be denied:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. * * * *A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.*

Supreme Court Rule 10. (Emphasis added.)

Thus, the decisions of the Supreme Court reflect the general rule that the Court will deny certiorari when, as here, review is sought of a lower court decision that turns exclusively on an analysis of the particular facts raised. *See United States v. Johnston*, 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925)("We do not grant a certiorari to review evidence and discuss specific facts.") This general rule is even more applicable where the district court's factual determinations are affirmed by the court of appeals. *See Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538 (1949)("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

While "the perceived correctness of the judgment" sought to be reviewed is not one of the factors on which the discretion of the Supreme Court depends when reviewing applications for certiorari, *Ross v. Moffitt*, 417 U.S. 600, 616-17, 94 S.Ct. 2437, 2447 (1974)(Rehnquist, J.), in this case the District Court and all the judges on the Eleventh Circuit "got it right." A few examples of petitioners' admissions and the quality of petitioners' "evidence" presented below serve to confirm this conclusion, and, more

important, the care with which the District Court and the Eleventh Circuit parsed the records and addressed the evidence. Petitioners' suggestion that the Eleventh Circuit decisions contained "little analysis of the record" is belied by any review of those decisions themselves, which fully and properly analyzed the record. The lack of "pro-petitioner" inferences of which petitioners complain [App. 19] speaks resoundingly to the quality of the evidence presented by petitioners and not to any legal or factual error.

Petitioners principally contracted with Cagle JV to grow broilers at a time when Cagle JV was starting up its operations in south Georgia and was recruiting the various types of growers needed for the integrated production of chicken meat. [App. 42, 64, 83, 103.] As part of the recruiting process, each petitioner (except Glass, who prepared his own projections based upon his investigation) obtained income and expense projections generated by Cagle JV. These projections were based on industry averages and actual production on other farms in Georgia and, over time, proved to be accurate. [App. 57, 76, 85, 118.] More significantly, before contracting with Cagle JV, each petitioner undertook an independent investigation of the poultry growing industry, including discussions with poultry farmers already engaged in the business, and confirmed that Cagle JV's projections were reasonable. [App. 43-4, 58, 65, 84-5, 104.] As part of the recruiting process, petitioners were made aware that, as Cagle JV's operations expanded, its marketing strategies would change, resulting in changes in the sizes of the flocks and birds grown by petitioners. [App. 43, 66, 84, 105.]

Each petitioner "essentially admitted during depositions that the written projections [provided by Cagle JV] were not inaccurate." [App. 57, 76, 96, 118.] Despite their sweeping allegations that "Cagle JV caused fraudulent final statements [showing, *inter alia*, bird weight and pay] to be mailed," none of the petitioners could "point to a single

statement shown to be fraudulent." [App. 20, 75, 94, 117.] These admissions, among others, eroded all of petitioners' PSA and fraud-based claims. Similar admissions doomed their AFPA claims: "Glass testified in his depositions that he was not harassed by Cagle JV or its agents for participating in the [UPGA]," nor did he provide any evidence of retaliation for his membership.[9] [App. 4, 60; as to the other petitioners, *see* App. 9, 22, 79, 98, 110, 121.]

Also, "Glass ... admit[ted] that the bird quality problems he experienced were no different than what other growers experienced." [App. 48.] Both Glass and Wheeler admitted that they regularly checked their feed inventory to verify correct feed deliveries. [App. 53, 71.] While "Wheeler complained that the bigger birds resulted in less flocks per year, [he] acknowledged that with per pound increases in pay, his income stayed the same or improved." [App. 76.] Similarly, "[t]he Adkins did not complain when the flock sizes were reduced" since "[t]he increase in average size made up for the loss in the number of birds." [App. 86; *see also* App. 60, 118 for similar evidence for Glass, Mims.] None of the petitioners could identify any instances where Cagle JV misweighed their birds. [App. 18, 68, 92 ("the Adkins cannot point to a specific incident during which their birds were misweighed").] Indeed,

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[9] Petitioners' statements concerning their purported performance declines [*see* Petition at 10] are false and were properly rejected by the lower courts. Glass performed better and achieved his highest revenue after his involvement in the growers' association and meeting with Doug Cagle -- his rankings were unaffected. [*Glass*, Memorandum of Law in Support of Motion for Summary Judgment, Exs. "A"-"B."] Moreover, his rankings improved at one of his farms (known as Cypress Bottom) over the entire period, *and immediately improved* following the critical events (becoming active in the association). [*Glass*, MSJ App., Tab 128.] The Adkins' several farms similarly improved in grower rankings (from *48* of 92 in 1998; to *32* of 93 in 1999; and to *17* of 88 in 2000 at one; and from *80* of 93 in 1999 to *33* of 88 in 2000 at the other) despite joining the growers association. [*Id.*] In fact, the Adkins received an award from Cagle JV for their performance in 2000 (even before suit was filed). [*Adkins*, MSJ App., Tab 7 at 62-3.]

before the courts below, petitioners entirely ignored their burden to present facts, *as to them*, to support their claims rather than generalized, ambiguous "beliefs." Petitioners' admissions, especially when viewed with their failure to come forward with affirmative evidence of bad birds, feed and misweighing, clearly warranted the entry and affirmance of summary judgment on petitioners' claims, and "supervisory" review by this Court is not warranted.

None of the multiple affidavits submitted by petitioners here [App. 138-156, 161-64] or others proffered below support any of the "facts" now alleged in the Petition or petitioners' claims below. Indeed, the affidavits, including "statements" by former employees, do not even mention any of the petitioners or were recanted by the affiant. For example, Joe Gaines admitted he was joking when he suggested preferential treatment. [App. 154.] And, as the District Court agreed, a review of petitioners' own weight tickets (which indicated the times weighed) confirmed that weighing was *not* delayed at all, much less to an arbitrary time in the morning (as misrepresented by petitioners at all judicial levels despite their own documents). [*See, e.g.*, App. 114.]

This dearth of specific, probative evidence, and misrepresentation of the record, did not escape the attention of the Eleventh Circuit. For example, the Eleventh Circuit rejected the growers' allegations that Cagle JV "targeted [them] to receive poor flocks," noting that their "strongest" alleged evidence, the affidavit of a former "chick bus driver" (Kenneth E. Cabiness), did not even suggest targeting:

> The driver's affidavit merely stated that he recalled chick deliveries being changed from one farm to another and being told that

> certain houses were not ready and he needed to take the chicks to another farm.

[App. 31, n.4.][10]

Instead, the Eleventh Circuit appropriately found that the growers had "produced no evidence suggesting that Cagle [JV] targeted [them] to receive poor flocks or even suggesting a likelihood of it." [App. 32.]

Moreover, contrary to petitioners' representations to this Court, the District Court concluded that, even crediting "plaintiffs' interpretation" of Bennie Morris' testimony regarding weighing (but ignoring Morris' clear statement that any weighing irregularities ended in 1987), petitioners still failed to meet their burden to show that *their* birds were misweighed:

> Lastly, as correctly pointed out by Cagle JV, this is not a class action. Even if Plaintiffs' interpretation of Morris testimony were true, the Adkins cannot point to a specific incident during which *their* birds were misweighed.

[App. 92 (emphasis added); *see also* App. 114 (Mims).]

A final example of the "quality" of the evidence submitted by petitioners below (or lack of it) is the so-called "regression analysis" prepared by petitioners' expert, Dr. Robert Taylor. The report containing the "regression analysis," which purported to demonstrate, mathematically, that petitioners were discriminated against in retaliation

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[10] Petitioners continue to misstate the Cabiness Affidavit here by again suggesting that Cabiness stated that the "chick delivery schedule" could be manipulated by Cagle JV to target growers for poor quality chicks. [Petition at 11.] As the District Court and Eleventh Circuit concluded, upon reviewing that evidence, even the most cursory review of the Cabiness Affidavit makes clear that Cabiness made no such statement.

for joining the UPGA and refusing the 1999 arbitration contract, at most stated only that there was "weak" support for any correlation. [*Mims*, MSJ App., Tab 84 at 4; *Glass*, MSJ App., Tab 121 at 103-4.] More important, during his deposition, Taylor admitted that his report and "regression analysis" did *not* show discrimination nor, critically, causation, but that it was simply "information." [*Glass*, MSJ App., Tab 121 at 76-7.] In fact, Taylor admittedly failed to consider, let alone eliminate, other relevant factors which could affect these growers' performance, nor could he exclude management by the growers as a factor affecting their net pay. [*Id.* at 51-2, 72-3, 92-3, 110-2, 126-8.] This type of "analysis" flies in the face of the established standard set forth in *Cooper v. Southern Co.*, 390 F.3d 695, 726 (11th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 7663 (October 17, 2005), which petitioners do not challenge:

> Even if we accept all the calculations underlying [the expert's] reports as correct, the reports' conclusions are of very limited value because the data on which those calculations were based was not meaningfully tailored. That is, even crediting as true the conclusions, we do not believe that a jury reasonably could infer, based on the evidence, that the plaintiffs established a pattern and practice claim. Summary judgment was therefore properly entered for the defendants....

Ultimately, Taylor conceded that he could not testify to a reasonable degree of scientific or professional certainty that Cagle JV discriminated against any of the petitioners, and admitted that his "estimate" was merely "speculation or

conjecture."[11] [*Glass*, MSJ App., Tab 121 at 91-3, 338.] In light of Taylor's concessions, petitioners' suggestion that his so-called report should trigger this Court's rare "supervisory" review under Supreme Court Rule 10(a) confirms the lack of any good faith basis for review and this Petition.

The Eleventh Circuit's review of the District Court's grant of summary judgment in each petitioner's case was *de novo*. Hence, the District Court and the Eleventh Circuit, upon full review of the records, found petitioners' cases lacking and made the appropriate factual findings. Those factual findings, given petitioners' admissions, and the lack of evidence presented on petitioners' behalf, are correct. Consistent with Supreme Court Rule 10 and its prior decisions, the Supreme Court should reject petitioners' misguided invitation "to review evidence and discuss specific facts." *United States v. Johnson, supra.*

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. Despite petitioners' repeated, but misguided pleas, there also can be no basis to defer this decision at this time as these cases were factually (not legally) driven and no overriding legal principle or

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[11] *Adkins*: Taylor admitted that 30% of the factors affecting the Adkins' net pay could *not* be explained but did not relate to any purported retaliation by Cagle JV, and that he had not excluded performance-based factors, including the Adkins' management. [*Glass*, MSJ App., Tab 121 at 88.] *Glass*: Taylor admitted that his testing results were "unreliable analyses" and "totally insignificant," not even measuring weak support. [*Glass*, MSJ App., Tab 121 at 109-110.] *Wheeler*: Taylor concluded that "being a member of the growers association only [had] a *slight* affect on net pay adjustments" and that *any* negative impact was "recovered following the filing of his complaint." [*Wheeler*, MSJ App., Tab 74 at 4.] He characterized his conclusion of any relationship as "weak" with a low level of confidence in the regression analyses. [*Glass*, MSJ App., Tab 121 at 101.]

conclusion had any relevance. No decision by this Court in connection with the pending *London* Petition will cause a different result in these cases – even a reversal of the Eleventh Circuit's decision in *London* cannot change the factual records in these four cases nor add any facts which would somehow support petitioners' false and baseless assertions.

RESPECTFULLY SUBMITTED,

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In The

Supreme Court of the United States

MARK A. GLASS and
MARK A. GLASS ENTERPRISES, INC., *et al.*,

Petitioners,

v.

CAGLE FOODS JV, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

PETITIONERS' REPLY

A. After Briefing and Urging the *London* Standard Below, Respondent Cannot Now Assert That the *London* Standard is Unrelated to Petitioners' PSA Claims.

The Response claimed repeatedly that the issue raised in *London v. Fieldale Farms Corp.*, 410 F.3d 1295 (11th Cir. 2005), *pet. cert. pending* – "only . . . practices affecting competition are prohibited by the PSA" (*London*, No. 05-411, App. 11a) – was not raised in these cases (Response 16,18,19). But, in fact, Respondent had urged that standard below in these cases at page 14 in its brief in *Adkins v. Cagle Foods JV, LLC,* No. 04-11447 (11th Cir. 06/13/2005), at page 18 in its brief in *Wheeler v. Cagle Foods JV, LLC,* No. 04-15444 (11th Cir. 06/08/2005) and at page 22 in its brief in *Glass v. Cagle Foods JV, LLC,* No. 04-15431 (11th Cir. 04/05/2005).

In addition, the Response failed to explain that the *London* issue was squarely addressed by the Eleventh Circuit in *Mims v. Cagle Foods JV, LLC*, No. 04-11570 (11th Cir. 06/15/2005). In *Mims*, the Eleventh Circuit found that the Respondent terminated Mims' contract after the flock placed on Mims' farm in January 2001, and then refused to place any more birds on the farm managed by Mims as long as Mims was the manager. (Pet. App. 29) Finding the facts as to termination of the contracts with inferences for Mims (Pet. App. 29, fn.1), the court then cited *London v. Fieldale* that "termination of a contract without economic justification is insufficient to sustain a claim under the PSA absent the showing of an anticompetitive effect." (Pet. App. 30, fn.2)

The Response found it convenient to completely avoid the legal issues framing each decision, and it ignores much of the Petitioners' argument, and much of what was said by the Eleventh Circuit, in its four opinions. Facts sufficient under the negligence standard previously accepted for the PSA in this Court were seen as lacking by the Eleventh Circuit, persuaded by Respondent to require proof of intentional conduct or "practices affecting competition." The Eleventh Circuit used the wrong standards of proof and found that Petitioners' facts failed to meet those standards.

In addition, the Response fails to explain the Eleventh Circuit's reference to *Adkins* in *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272 (11th Cir. 2005). The Response suggests that the *Pickett* panel cited but somehow did not rely on *Adkins*. *Pickett*, citing *Adkins*, held that claimants under the PSA must show that an unfair practice either does cause or is likely to cause an anticompetitive injury to prevail. *Pickett* at 14. In fact, the *Adkins* decision had adopted the "affecting competition" standard urged by Respondent at page 14 of its *Adkins* brief. In citing *Adkins*, the *Pickett* decision sheds light on the Eleventh Circuit's underlying reasoning in all of these cases, that an unfair practice under the PSA is not actionable absent a showing of anticompetitive effect. This Court should accept certiorari here or hold this matter for a decision in *London* and rule on the split in the circuits, restoring producers like Petitioners to the rights granted them in the PSA.

B. Respondent Ignores the Eleventh Circuit's Language in *Adkins* and *Mims* Requiring Proof of Discriminatory and Intentional Conduct to State a Claim Under the PSA.

The Response is in denial about the Eleventh Circuit requirements of "discriminatory purpose" and "specific targeting" in Adkins' and Mim's PSA claims. Ignoring *Butz v. Glover Livestock Comm.*, 411 U.S. 182, 93 S.Ct. 1455 (1973), the Respondent had argued in *Glass* and *Wheeler* that "there is no reported decision, however, where contract breaches or something other than an intentional act of discrimination or anti-competitive conduct were determined to be sufficient to support a PSA claim." *Glass* Brief at 21; *Wheeler* Brief at 17. Respondent had compared a fraud standard of intent to that for the PSA at page 15 of its brief in *Adkins* and page 17 of its brief in *Mims*.

Adopting the intentional targeting standard urged by Respondent, the Eleventh Circuit stated in *Adkins*, "nothing in the record suggests that Cagle JV ever delivered poor quality chicks to the Adkins, or any other broiler growers with any discriminatory purpose." (Pet. App. 17) The court then found that, "the Adkins did nothing to show that they were ever specifically targeted for insufficient or inferior feed." (Pet. App. 18) Finding no evidence of discrimination, or that the Adkins were "specifically targeted," the Eleventh Circuit summarily disposed of the Adkins' PSA, bird quality, and feed claims. (Pet. App. 18)

Respondent's assertion that the Eleventh Circuit found *no evidence* that Petitioners consistently ran out of feed or received unhealthy birds is belied by careful review of each decision. The *Mims* panel, after first finding that Mims and his employees provided deposition testimony that Mims received a significant number of "bad looking

birds" (Pet. App. 31), rejected Mims' PSA claim because, "Mims produced insufficient evidence that he received more bad birds than other growers because of retaliation." (Pet. App. 32) Addressing Mims' delayed feed claim, based on Mims' evidence that he frequently ran out of feed, the panel concluded that a jury could not reasonably conclude that "Mims was retaliated against." (Pet. App. 33) The court arrived at this result based upon the wrong interpretation of the PSA – an interpretation urged upon the court by Respondent – that the PSA requires evidence of *intentional* conduct.

Given the volume of evidence that Respondent's bird quality was substandard, and that feed shortages were frequent and common and that those problems were caused by the negligence of Respondent, Respondent was rash to assert before this Court that Petitioners presented no evidence supporting these claims. Respondent's own hatchery manager admitted that Respondent failed to properly vaccinate its pullet (young breeder flocks), resulting in disease outbreaks in the broiler houses. Respondent's own complex manager, and many of Respondent's employees, testified about serious disease problems caused by Respondent, particularly on Mark Glass' farm, problems that were well-documented in Respondent's own records, which were reviewed and summarized by Petitioners' expert. (Pet. App. 125-132)

Petitioners testified at length about the bad birds they received due to Respondent's actions or inaction. "We had rickets, we had e-coli in baby chicks, we had aspergillosis that apparently we were told had come from the hatchery. We had birds that would be rotten . . . they were green inside. They would die. We had consistent leg problems. We had birds that we brought to the farm with CAV . . .

We had birds that were brought with dermatitis . . . I had serious health problems on my farm that were chronic and consistent and continued for years." (Glass Depo. pp. 244, 290) Lucius Adkins testified, "for at least two years, every time we got birds, they were obviously inferior, sick, small, weak . . . There have been numerous instances of poor birds. And in a perfect world, all growers will get poor birds sometimes and good birds most of the time. I talked to growers who always got good birds and they bragged about it . . . Joe Gaines was one." (Adkins Depo. pp. 76, 87) The Adkins went from above average to below average for two years because of bad birds. (Jill Adkins Depo. p. 62) Wheeler testified, "It's not that there were problems with the chicks from time to time. I had problems with chicks all the time." (Wheeler Depo. p. 175) Petitioners' deposition testimony, and interrogatory responses, in which they specifically identified some of their poor quality birds, were confirmed by their employees, by Respondent's employees, and by records reviewed by Petitioners' expert, Dr. Paul Miller.

The record is also replete with evidence of feed delivery failures. Mims testified, "Every grow-out, at least at some point in every grow-out, we would run out of feed." (Mims Depo. p. 328) The Adkins documented in calendars and interrogatory responses six grow-outs in a two-year period on which they ran out of feed but they indicated they had many more. Wheeler testified that he ran out of feed more times than he could count. "I wouldn't be afraid to say\'75 or 100 times. I can recall grow-outs where it was 6 or 8 times in one grow-out." (Wheeler Depo. p. 175) Glass similarly testified that he ran out of feed often. (Glass Depo. pp. 462, 463) Two of Respondent's feed mill managers swore in affidavits and other Respondent employees

testified that problems with feed deliveries were chronic and longstanding. (Pet. App. 135-137) Petitioners produced uncontroverted evidence that the effect of running out of feed was devastating to the grower's income. (Pet. App. 136, 140)

The Eleventh Circuit's interpretation of the Packers & Stockyards Act to require some showing of intentional discrimination is also at odds with the Fourth, Sixth, and Eighth Circuits, which have properly interpreted this Court's holding in *Butz*. "Moreover, like the Eighth Circuit, we acknowledge that nothing in 7 U.S.C. § 204, which authorizes suspensions, 'confines its applications to cases of "intentional and flagrant misconduct" or denies its application in cases of negligent or careless violations.'" *Parchman v. U.S. Dept. of Agriculture*, 852 F.2d 858, 864 (6th Cir. 1988), citing *Farrow v. U.S. Dept. of Agriculture*, 760 F.2d 211, 216 (8th Cir. 1985) (quoting *Butz v. Glover Livestock*, 411 U.S. at 187). Similarly quoted in *Hutto Stockyard v. U.S. Dept. of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1999).

Petitioners assert that as between the integrator and the growers, it is unfair for the integrator to negligently fail to provide industry standard vaccination for birds and unfair for the integrator to negligently fail to provide for industry standard feeding. Petitioners claim that such unfair negligence is proscribed by the PSA, even if it is not shown to be purposeful. Respondent's negligence damaged Petitioners. This Court should grant certiorari and remand this case for review under a PSA negligence standard.

C. The Cases Presented Are Extremely Important to the Enforcement of the PSA and the AFPA, and the Court Should Exercise Its Discretion to Revisit the Lower Court's Clearly Erroneous Factual Findings.

Consistent with the tenor of its Response, Respondent argues that this Court should never grant certiorari based on a lower court's erroneous factual findings. Petitioners fully recognize that it is a rare case where review of a lower court's factual findings is warranted. However, because of the important public policy implications of this matter and the relation between factual finding and the proper proof standards, Petitioners assert that this is just such a case.

In affirming summary judgment for Respondent in these cases, the Eleventh Circuit ignored substantial evidence in the record, failed to draw permissible inferences from disputed facts, and apparently misunderstood the gist of Petitioners' primary complaint. Respondent paid its growers by comparing the efficiency of each grower to the group whose birds were processed in the same week. Efficiency was measured by how well the birds gained weight in comparison to the feed delivered to the farm. More efficient growers received more pay for each pound of birds. Birds unhampered by disease or feeding problems created more pounds to be paid.

Inferior birds do not perform as well. All of these Petitioners testified both as to normal flocks and later bad flocks where they received inferior and diseased birds in numbers much greater than normal flocks. Based upon that corroborated testimony and based on expert opinion detailing Respondent's negligent failures to vaccinate birds, there is a reasonable inference that Petitioners'

decline in rankings and lower pay resulted at least in part from Respondent negligently or intentionally delivering inferior or diseased birds to Petitioners. (Pet. App. 125-132, 153)

Running out of feed causes critical feed conversion problems in flocks. By either intentionally or negligently allowing Petitioners to run out of feed, Respondent placed Petitioners at a distinct disadvantage to all other growers within their group who did not run out of feed or who received double deliveries. (Pet. App. 135-137, 140) In addition, manipulating feed delivery and recovery figures and settlements to benefit one grower within the group (like Joe Gaines) disadvantaged all other growers settling within the same group. (Pet. App. 140, 145) Another reasonable inference from the evidence submitted by Petitioners is that their drop in their yearly average rankings was explained by Respondent's negligent or intentional failure to consistently deliver feed to Petitioners or account for feed used by Petitioners' flocks.

Where volumes of admissible probative evidence is ignored by the Circuit Court, and where that is encouraged by the application of wrong standards to important federal legislation, this Court can and should instruct as to improper fact finding.

CONCLUSION

From its inception, the Packers & Stockyards Act has been interpreted by this Court broadly to effectuate the evil sought to be remedied by Congress. "It was for Congress to decide, from its general information and from such special evidence as was brought before it, the nature

of the evils actually present or threatening, and to take such steps by legislation within its powers deemed proper to remedy them." *Stafford v. Wallace*, 258 U.S. 495, 513 (1922).

This Court noted in *Stafford* that one of the chief evils feared by Congress in enacting the PSA was the extraordinary power of the packers to lower the price paid to producers. *Supra* at 516. As the power of the processors has increased through integration and consolidation, the returns to growers have steadily declined.[1] Studies of the poultry industry reveal that while companies have enjoyed a twenty to thirty percent return on their investment, returns to poultry growers have been in the dismal one to three percent, despite the fact that growers invest over fifty percent of the capital needed to grow chickens. Poultry growers earn well below minimum wage, and over seventy percent have incomes below poverty level from their poultry operations and qualify for food stamps.[2] By targeting the leaders of one of the largest poultry growing associations in the country, by spending millions in defense of their claims, by manipulation and loose representation of those facts, Respondent has thus far succeeded in putting Petitioners "in their place." By allowing it to happen, the Eleventh Circuit has promoted the very evil Congress sought to dispel. The Eleventh Circuit has sent a

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[1] C. Robert Taylor, *Restoring Economic Health to Contract Poultry Production*, p. 6, at http://www.auburn.edu/~taylocr/topics/reports/recent.htm; U.S.D.A., *A Time to Act – A Report of the USDA National Commission on Small Farms*, at http://www.nasda-hq.org/joint/farmbill/smfarm_rpt.html.

[2] Deborah Thompson Eisenberg, *The Feudal Lord in the Kingdom of Big Chicken: Contracting and Worker Exploitation by the Poultry Industry*, at http://www.nelp.org/docUploads/eisenberg.pdf.

clear message to poultry growers that they need not bother because they have no right to fair treatment. The petition should be granted to correct the obvious errors of the lower court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 2005